U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM A. CRISSEY and DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUND, Aberdeen, MD

Docket No. 00-937; Oral Argument Held on April 18, 2001; Issued May 22, 2001

Appearances: *William D. Hooper, Esq.*, for appellant; *Miriam D. Ozur, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI, PRISCILLA ANNE SCHWAB

The issue is whether appellant is entitled to a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for a left ankle fracture and laceration of the right hand. At the time of the hearing on July 26, 1999, appellant was performing light-duty work.

In a report dated April 15, 1998, appellant's treating physician, Dr. William Bruce Russell, a Board-certified orthopedic surgeon, found that appellant had joint enlargement of the left ankle, dorsiflexion to 15 degrees, plantar flexion to 20 degrees, inversion to 30 degrees and eversion to 20 degrees.[1] He stated that there was minimal discomfort on passive eversion and inversion ranges of motion and that appellant had dysesthesia on the dorsal surface of the foot at times. Dr. Russell opined that appellant had a 20 percent impairment of the left lower extremity due to the foot and ankle condition. He stated that his assessment included consideration of the factors of pain, discomfort, weakness, limited endurance, functional impairment and joint enlargement. Dr. Russell added that he had prepared the report in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994).

In a report dated December 22, 1998, a second opinion physician, Dr. Kevin E. McGovern, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination, reviewed x-rays and diagnosed avulsion chip fracture of the left ankle. He noted that appellant continued to complain of pain in his left ankle. Dr. McGovern found that appellant had no atrophy of his leg and no swelling of the ankle, with full motion and no instability. He also found that appellant had a good doraslis pedis pulse and

[1] In his April 1, 1998 report, Dr. Russell considered appellant's history of injury.

intact sensation and was able to stand on his toes and heels without difficulty. Dr. McGovern concluded that appellant had a zero percent impairment to his left lower extremity using the A.M.A., *Guides*.

By decision dated March 12, 1999, the Office denied the claim, stating that the medical evidence established that appellant was not entitled to a schedule.

By letter dated March 23, 1999, appellant requested an oral hearing, which was held on July 26, 1999. At the hearing, appellant described his work history and his physical examinations by Drs. Russell and McGovern, noting that Dr. Russell used calipers and measuring devices while Dr. McGovern did not. Appellant testified that he had trouble performing his light-duty work sitting at a computer because he was limited to intermittent sitting and standing for three hours due to pain in his leg and foot.

By decision dated September 20, 1999, the Office hearing representative affirmed the Office's March 12, 1999 decision.

By letter dated October 11, 1999, appellant requested reconsideration of the Office's decision and submitted additional medical evidence. In his report dated February 17, 1999, Dr. Russell stated that appellant had localized pain over the dorsal aspect of the foot and the lateral ankle with range of motion full. He stated that there was a slight enlargement of the left ankle compared to the right. In his report dated March 3, 1999, Dr. Russell stated that appellant continued to complain of pain in his left ankle as well as in other parts of his body. He stated that appellant had slight joint enlargement of the left ankle, full range of motion and dysesthesia on the dorsal surface of the foot. In his report dated March 17, 1999, Dr. Russell stated that appellant's symptoms were "essentially unchanged" since the last visit.

On a form from the Office entitled, "Items Necessary to Calculate Schedule Awards for the Permanent Functional Loss of an Extremity," Dr. Russell provided appellant's history of injury and noted appellant's complained of pain in the left. He stated that the intensity of appellant's pain was moderate to severe, it was almost constant and it was aggravated by standing, walking and activities of daily living. Appellant had flexion of 20 degrees, extension of 15 degrees, varus of 30 degrees and valgus of 20 degrees. The April 15, 1998 x-ray of the left ankle showed a slight deformity in the lateral aspect of the talus from trauma. Dr. Russell opined that appellant had a 20 percent impairment to the lower extremity based on A.M.A., *Guides* and that the date of maximum medical improvement was April 15, 1998.

In a note dated November 29, 1999, the district medical adviser stated that the physical therapy note of January 5, 1998 indicated "essentially full range of motion" of the ankle, that Dr. McGovern found his examination of appellant's ankle within normal limits and that, therefore, there was no basis for a schedule award.

By decision dated December 17, 1999, the Office denied appellant's request for modification.

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

The schedule award provision of the Federal Employees' Compensation Act[2] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[3] 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.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides that, where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[5] In this case, a conflict exists between the opinion of appellant's treating physician, Dr. Russell, that appellant has a 20 percent impairment to his left lower extremity and the opinion of the referral physician, Dr. McGovern, that appellant is not entitled to a schedule award. Although Dr. Russell's reports contain some discrepancies range of motion, he stated in the February and March 1999 reports that appellant continued to complain of pain in his left ankle and had slight joint enlargement. In the schedule award" form dated October 6, 1999, which he completed pursuant to the Office's request, Dr. Russell stated that appellant had almost constant, moderate to severe pain and provided percentages of appellant's range of motion of the left ankle pursuant to the A.M.A., *Guides.* He also found that the x-ray showed a slight deformity in the lateral aspect of the talus from trauma and concluded that appellant had a 20 percent impairment.

The discrepancies in Dr. Russell's reports regarding appellant's range of motion are not sufficient to diminish the probative value of his concluding report that appellant had a 20 percent impairment pursuant to the A.M.A., *Guides*. Although his use of the A.M.A., *Guides* could have been more specific, he nonetheless provided the information specifically requested by the Office as necessary to establish the percentage of impairment.

The case must, therefore, be remanded for the Office to refer the case and appellant with a statement of accepted facts to an impartial medical specialist to evaluate the medical evidence and provide a rationalized opinion on whether appellant's left ankle condition establishes his entitlement to a schedule award using the A.M.A., *Guides* (4th ed. 1994). The Office should then make a *de novo* decision on the augmented record.

[2] 5 U.S.C. § 8107 *et seq.*

[3] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[4] *Arthur E. Anderson, supra* note 3 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

[5] 5 U.S.C. § 8123(a); *Esther Velasquez*, 45 ECAB 249, 252-53 (1993).

The decisions of the Office of Workers' Compensation Programs dated December 17, September 20 and March 12, 1999 are hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
May 22, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member