U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FAITH DONCHEVA and U.S. POSTAL SERVICE,
POST OFFICE, National Park, NJ

Docket No. 02-2363; Submitted on the Record;
Issued September 8, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a 24 percent impairment of the left lower extremity.

In this case, the Office of Workers' Compensation Programs accepted that on June 8, 1994 appellant, then a 33-year-old letter carrier, sustained the condition of a left foot/ankle sprain during the performance of her duties. The condition of Morton's neuroma with plantar fasciitis was subsequently accepted by the Office and surgery was authorized. Appellant, however, refused to undergo surgery. She received appropriate medical and compensation payments.

On March 28, 1996 appellant filed a claim for a schedule award. After further development of the claim, by decision dated January 26, 2000, the Office granted her a schedule award for a 24 permanent impairment of the left foot for a total of 41 percent compensation, to run from weeks of July 21, 1999 to June 30, 2000.[1]

By letter dated February 9, 2000, appellant, through her attorney, requested a hearing before an Office hearing representative. In a decision dated May 22, 2000, the Office hearing representative vacated the prior decision and remanded the case to the Office to obtain a supplemental report from the Office referral physician, Dr. Tursi, explaining how he arrived at his impairment ratings and whether the impairment rating should be the foot or the leg.

In a June 13, 2000 report, Dr. Tursi explained how he arrived at his impairment ratings of a 17 percent lower extremity impairment and 24 percent foot impairment. He also opined that appellant's impairment rating should be based on the lower extremity, in light of the primary

[1] The rating was based on a July 21, 1999 medical report from Dr. Frank Tursi, a podiatrist and Office referral physician, who concluded that appellant had a 24 percent permanent impairment of the left foot and a 17 percent permanent impairment of the left lower extremity.

joint derangement of the ankle, range of motion limitations of the ankle joint and sensory nerve loss to the lower extremity.

In an August 8, 2000 report, an Office medical adviser reviewed the medical evidence of record and, based on Dr. Tursi's June 13, 2000 report, advised that, under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 17 percent lower extremity impairment and a 10 percent foot impairment.

In a decision dated August 28, 2000, the Office denied appellant's claim for an increased schedule award. The Office found that she was entitled to an award for a 17 percent loss of use of her left lower extremity, which would entitle her 48.96 weeks of compensation. It noted, however, that, as the previously awarded 24 percent loss of use of the left foot had entitled appellant to 49.20 weeks of compensation, she did not establish that she was entitled to a schedule award greater than 24 percent permanent impairment of the left foot.

In a letter dated August 30, 2000, appellant's attorney requested a hearing that was held on March 1, 2001. At the hearing appellant testified regarding her job duties and her foot condition and submitted an undated report from Dr. Stanley David, a podiatrist, who advised that the impairment rating should be based on the lower extremity, presented his calculations and advised that appellant had a 34 percent impairment of the whole person.

In a March 15, 2001 report, an Office medical adviser found that Dr. David's undated report failed to contain the actual measurements which were needed to calculate and verify the permanent impairment percentages. Accordingly, he found that there were no new objective findings to change the previously awarded permanent impairment award.

In a February 15, 2001 report, which the Office received June 6, 2001, Dr. Nicholas P. Diamond, an osteopath, found that appellant reached maximum medical improvement on February 15, 2001, presented his examination findings and calculations based on the fifth edition of the A.M.A., *Guides* and opined that appellant had 24 percent left lower extremity impairment.[2]

By decision dated June 13, 2001, the Office hearing representative set aside the August 28, 2000 decision and remanded the case for a *de novo* decision. The hearing representative specifically advised that an Office medical adviser review Dr. Tursi's impairment rating of the left lower extremity and measurements for range of motion, weakness and sensory deficits.

In a letter dated July 5, 2001, the Office requested its Office medical adviser to review Dr. Tursi's July 19, 1999 and June 13, 2000 reports and to calculate the extent of permanent impairment of appellant's left lower extremity under the fifth edition of the A.M.A., *Guides*. No response was received. The Office additionally referred appellant, along with a statement of

[2] The Office hearing representative noted that, although appellant had requested 30 days to submit a report from Dr. Diamond, none was received. The Board notes that Dr. Diamond's report was received by the Office June 6, 2001 and should have been considered by the Office hearing representative. The Board deems this harmless error, in light of the Office hearing representative's disposition of the case.

accepted facts, a set of questions and the medical record, to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In an August 2, 2001 report, Dr. Maslow presented his findings on examination and noted that he reviewed the medical records along with the statement of accepted facts. He opined that appellant did not show objective evidence of any disability or permanency causally related to the accident of 1994. Dr. Maslow noted the conditions the Office had accepted and the fact that appellant had refused to undergo the authorized left foot surgery. He opined that appellant's gait was exaggerated and was not a true antalgic gait and found normal motions on examination and a normal sensory examination about the foot and ankle. Dr. Maslow opined that she did not require further treatment, but stated that it would have been reasonable for appellant to have had an electromyography and a nerve conduction study along with magnetic resonance imaging scan of the ankle and foot, but that appellant did not require such testing at the time of his examination as she was perfectly capable of normal work activities without restriction.

In a report dated September 5, 2001, an Office medical adviser stated that, based on Dr. Maslow's report, there was no permanent impairment of the left lower extremity. He noted that both the orthopedic and neurologic examinations revealed no defects that could be used in conjunction with the A.M.A., *Guides* to calculate a scheduled loss and that Dr. Maslow found normal motions and normal sensations about the foot and ankle. The Office medical adviser concluded that there was no objective disability.

By decision dated September 21, 2001, the Office denied appellant's claim for an additional schedule award. The Office attributed the weight of the medical evidence to Dr. Maslow's report. It found that, since appellant did not establish that she had an impairment of the left lower extremity causally related to her work injury of 1994, she was not entitled to an increased schedule award.

In an October 17, 2001 letter, appellant's attorney requested a hearing, which was held on March 13, 2002. No new medical evidence was submitted. By decision dated May 30, 2002 and finalized June 6, 2002, an Office hearing representative affirmed the September 21, 2001 decision, finding that appellant had no greater than the 24 percent permanent impairment of the left foot which had been previously awarded.

The Board finds that appellant has no more than a 24 percent impairment of the left lower extremity and, thus, is not entitled to an additional schedule award.

The schedule award provisions of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides*[5] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[6]

On appeal appellant, through her attorney, alleges that she is entitled to a schedule award greater than 24 percent permanent impairment of the left foot, for which she had received a schedule award.

In this case, the Office originally awarded compensation for a 24 percent permanent impairment of the left foot, which entitled appellant to 49.20 weeks of compensation. The Office then determined that the schedule award should be based on an impairment rating to the left lower extremity. After further development, the Office noted that the impairment rating should include the specific findings concerning ranges of motion, weakness and sensory deficits as noted by Dr. Tursi, an Office referral physician. It then relied on the report of Dr. Maslow, another Office referral physician, in finding that, as appellant had no objective evidence of permanent impairment, she was not entitled to an award greater than the one she had previously received.

Initially, the Board notes that, in the course of developing appellant's schedule award claim, she was referred to two Office referral physicians for second opinion evaluations. The Board finds that the Office's action in referring appellant to Dr. Maslow for another second opinion examination, to determine the extent of her permanent impairment was reasonable under the circumstances of this case and did not constitute an abuse of discretion. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office, with the only limitation on this authority of reasonableness.[7] The Office's regulations provide that an injured employee "shall be required to submit to examination by a U.S. Medical Officer or by a qualified private physician approved by the Office, as frequently and at such times and places as in the opinion of the Office may be reasonably necessary."[8]

The Office hearing representative, in her June 13, 2001 decision, specifically found that the Office medical adviser should have evaluated Dr. Tursi's July 19, 1999 and June 13, 2000 reports under a different section than that of 3.2(b) of the fourth edition of the A.M.A., *Guides* as Dr. Tursi had listed ranges of motion, weakness and sensory deficits in his reports. On remand, however, the Office referred appellant to Dr. Maslow for another second opinion evaluation. Initially, the Board notes that, although the Office hearing representative referenced the fourth edition of the A.M.A., *Guides*, in finding the Office medical adviser's evaluation of Dr. Tursi's reports to be deficient, the fifth edition of the A.M.A., *Guides*, which was effective February 1,

[5] A.M.A, *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[6] *Ronald R. Kraynak*, 53 ECAB ___ (Docket No. 00-1541, issued October 2, 2001).

[7] *Daniel F. O'Donnell*, 46 ECAB 890 (1995); *James C. Talbert*, 42 ECAB 974 (1991).

[8] 20 C.F.R. § 10.407(a).

2001, is the appropriate version to utilize and contains 13 methods to evaluate impairments of the lower extremities, which are separated into 3 nonmutually exclusive assessment categories.[9]

In light of the fact that appellant was seeking an increased award, it was reasonable for the Office to refer appellant for a more recent second opinion evaluation than having an Office medical adviser apply the fifth edition of the A.M.A., *Guides* to Dr. Tursi's July 19, 1999 and June 13, 2000 reports. Accordingly, the Office properly referred appellant to Dr. Maslow for an updated second opinion evaluation.

In his report of August 2, 1991, Dr. Maslow found that appellant did not present any objective evidence of any disability or permanency causally related to the accepted conditions.

The record reflects, however, that Dr. Diamond, in his February 15, 2001 report, found that the work-related injury of June 8, 1994 produced appellant's subjective findings of pain and limitations in her activities of daily living and produced objective findings in terms of ambulation, range of motion, motor strength testing and tenderness of the ankle/foot area, which resulted in an abnormal neurological examination. He further opined, utilizing the fifth edition of the A.M.A., *Guides*, that appellant had a 24 percent left lower extremity impairment. Dr. Diamond provided the following range of motion deficits: dorsiflexion of 0 to 10/15 degrees which equated to a 7 percent impairment;[10] plantar-flexion of 0 to 35/55 degrees;[11] inversion of 0 to 15/35 degrees which equated to a 2 percent impairment;[12] and eversion of 0 to 10/20 degrees; which equated to a 2 percent impairment.[13] This equated to a total range of motion deficit of 11 percent. He noted that motor strength testing was a grade of 4/5 involving dorsiflexion on the left, as opposed to 5/5 on the right and found that resulted in a 12 percent motor strength deficit.[14] Dr. Diamond further noted that appellant had complaints of constant pain in her left foot and ankle and exhibited pain in all range of motion testing. He found that appellant had a three percent pain related impairment.[15] Combining the 11 percent range of motion deficit with the 15 percent deficit derived from motor strength deficit and pain results in a 24 percent left lower extremity impairment.[16]

The Board notes that Dr. Diamond, in finding a 24 percent left lower extremity impairment, relied on range of motion, muscle strength and pain impairment findings. Table 17-

[9] A.M.A., *Guides*, *supra* note 5, Section 17.2, Table 17-1 at 525.

[10] *Id.* at Table 17-11 at 537. The Board notes that dorsiflexion is another word for extension. Under Table 17-11, an extension of 10 degrees equates to a 7 percent lower extremity impairment.

[11] The Board notes that this would equate to a zero percent impairment under Table 17-11.

[12] A.M.A., *Guides*, *supra* note 5, Table 17-12 at 537.

[13] *Id.*

[14] *Id*. at Table 17-8, at 532.

[15] *Id*. at Figure 18-1, at 574.

[16] *Id*. at 604.

2 of the A.M.A., *Guides*[17] precludes using both range of motion and muscle strength in assessing impairment. As muscle strength resulted in the highest impairment rating, 12 percent, as opposed to an 11 percent impairment arising from range of motion, the Board finds that the 12 percent for dorsiflexion deficit is less than that awarded. The fifth edition of the A.M.A., *Guides* further provides that "the impairment ratings in the body system organ chapters make allowance for any accompanying pain."[18] Section 18.3b advises that pain should not be rated if the condition can be adequately rated on the basis of the body and organ impairment rating systems, given in other sections of the A.M.A., *Guides*.[19] Pain is to be assessed using the protocols described in Tables 18-4 through 18-7.[20] Even allowing for an additional 3 percent for pain, the Board finds that a total of a 15 percent impairment rating is less than that awarded.

Accordingly, as the record contains no evidence to support an award greater than the 49.20 weeks of compensation appellant previously received for a 24 percent permanent impairment to her left foot, the Board finds that the Office properly denied appellant's claim for an additional schedule award.

The decision of the Office of Workers' Compensation Programs dated May 30, 2002 and finalized on June 6, 2002 is hereby affirmed.

Dated, Washington, DC
September 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[17] *Id*. at Table 17-2 at 526.

[18] *Id*. at Chapter 2.5e, page 20.

[19] *Id.* at Chapter 18.3b, page 571.

[20] *Id.* at pages 575-84.