United States Department of Labor
Employees' Compensation Appeals Board

SCOTT D. HOSKINS, Appellant	)	
and	)	**Docket No. 05-760**
	)	**Issued: June 21, 2005**
DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Cherry Point, NC, Employer	)	

Appearances:
Scott D. Hoskins, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On February 10, 2005 appellant filed a timely appeal from a November 12, 2004 Office of Workers' Compensation Programs' schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the November 12, 2004 decision.

ISSUE

The issue is whether appellant has more than a 20 percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

This case was previously before the Board.[1] By decision dated May 4, 2004, the Board remanded the case for further development of the medical evidence.[2] The Board's May 4, 2004 decision is incorporated herein by reference.[3]

In a report dated May 21, 2003, Dr. Donald S. Bright, an attending Board-certified orthopedic surgeon, found that appellant had a 15 to 30 percent impairment of the whole person due to gait derangement, antalgic limp with shortened stance and use of a cane;[4] atrophy of the unilateral leg muscle and loss of muscle mass;[5] Grade 1 to 2 knee flexion for a 10 percent impairment of the whole person; severe valgus for an impairment of 16 to 20 percent of the whole person[6] and severe collapse of the valgus with essentially no remaining articular cartilage for a 20 percent impairment of the whole person.[7] He noted a final rating of 50 to 60 percent of the foot or 20 to 30 percent of the whole person.

In memoranda dated June 17 and 24, 2004, an Office medical adviser noted that Dr. Bright recommended a 50 to 60 percent permanent impairment of the left foot but had not correctly applied the A.M.A., *Guides.* He stated that Table 17-33 at page 546 provided for a 12 percent impairment of the lower extremity for a plateau fracture of five to nine degrees but Table 17-31 at page 544 (arthritis impairments based on cartilage level) could not be applied because Dr. Bright did not provide a cartilage measurement. The Office medical adviser indicated that Table 17-2 at page 526 precluded adding impairment for an x-ray gait derangement, muscle atrophy, range of motion (Tables 17-5, 17-6 and 17-10 at pages 529, 530 and 537) to the use of Table 17-33 (Diagnosis-Based Estimates or DBE) at page 546.

By letter dated July 13, 2004, the Office asked Dr. Bright to provide a new impairment rating of appellant's left lower extremity based on a proper application of the fifth edition of the

[1] Docket No. 04-200 (issued May 4, 2004).

[2] The Board found that the Office medical adviser who determined that appellant had a 20 percent impairment of the left lower extremity had not considered all the medical evidence because he had not been provided with a May 21, 2003 report from appellant's attending physician.

[3] On February 22, 2002 appellant, then a 39-year-old instrument mechanic, sustained a left tibial plateau fracture when an electric cart he was pushing overturned. On that date he underwent arthroscopic surgery with left knee fixation. By decision dated September 10, 2003, the Office granted him a schedule award for 57.6 weeks for the period December 10, 2002 to January 17, 2004 based on a 20 percent impairment of the left lower extremity. The record reflects that appellant received compensation for his 20 percent impairment in two checks dated September 12 and October 4, 2003.

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) at 526-29, Tables 17-2, 17-3, 17-5.

[5] A.M.A., *Guides* at 530, Table 17-6.

[6] *Id*. at 537, Table 17-10.

[7] *Id*. at 544, Table 17-31.

A.M.A., *Guides.* Dr. Bright responded that he would not change the rating he had determined in his May 31, 2003 report.

The Office referred appellant to Dr. Noel B. Rogers, a Board-certified orthopedic surgeon, for an examination and evaluation of his left lower extremity impairment. In a report dated October 26, 2004, Dr. Rogers found that appellant had a 19 percent impairment of the whole person[8] that included 10 percent for deformity based on Table 17-33 at pages 546-47 of the A.M.A., *Guides*, fifth edition,[9] 7 percent for gait derangement based on Table 17-5 at page 529, and 2 percent for atrophy based on Table 17-8 at page 532.[10] He stated:

> "If this [rating] must be for the lower extremity, one can back calculate this using Table 17.3 on page 527.… Gait derangement is 7 percent of the whole person and on using that table, a 7 percent impairment [of the whole person] is 17 percent of the lower extremity. Weakness is a two percent of the whole person which translates to a minimum of four percent of the lower extremity. Table 17-33 on page 546 … gives a 26 percent impairment [of the lower extremity] for the amount of valgus deformity [appellant] has. This would translate to a 47 percent partial permanent impairment of the lower extremity.[11]"

In a November 9, 2004 memorandum, Dr. James W. Dyer, an Office medical adviser, stated:

> "[Appellant] has a 26 percent PPI [permanent partial impairment] of the LLE [left lower extremity] based on … [left] tibia valgus angulation of 13 [degrees].… Based on Table 17-2 [at page] 526, A.M.A., *Guides*, fifth edition, DBE cannot be combined with other impairment as listed above (cross-usage chart). Therefore, based on A.M.A., *Guides*, [at page] 546, Table 17-33, the pathologic angulation of fracture of 13 [degrees] equals 26 percent PPI LLE which converts to 10 percent PPI whole person. Therefore, based on [October 26, 2004] [second opinion] report, [appellant] does not have a greater than 20 percent PPI rating."

By decision dated November 12, 2004, the Office denied appellant's claim for an additional schedule award on the grounds that the medical evidence did not establish that he had greater than a 20 percent impairment of the left lower extremity.

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[8] No schedule award is payable for a member, function or organ of the body that is not specified in the Federal Employees' Compensation Act or in the implementing regulations. While the A.M.A., *Guides* provides for both impairment to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person. *John Yera*, 48 ECAB 243 (1996).

[9] Dr. Rogers stated that appellant had a tibial plateau fracture with 20 degrees of valgus angulation of the left knee and 7 degrees of the right lower extremity. Subtracting 7 degrees (for the normal right leg) from 20 equals a 13 percent impairment based on Table 17-33 at page 546-47. He stated that Table 17-33 provides for a 2 percent impairment for each degree (up to 20); 13 multiplied by 2 equals a 26 percent impairment of the lower extremity.

[10] Dr. Rogers stated that appellant had no impairment due to decreased range of motion based on 120 degrees of flexion and Table 17-10 at page 537 of the A.M.A., *Guides*, fifth edition.

[11] Dr. Rogers added the 17, 4 and 26 percent impairments for the lower extremity to equal 47 percent.

LEGAL PRECEDENT

The schedule award provision of the Act[12] and its implementing regulation[13] sets 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 regulation as the appropriate standard for evaluating schedule losses.[14] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[15]

ANALYSIS

The report of Dr. Bright could not be used in determining appellant's impairment rating because it did not conform to the A.M.A., *Guides*. He concluded that appellant had 50 to 60 percent of the foot or 20 to 30 percent of the whole person.[16] However, Dr. Bright added to his rating based on Table 17-33 at pages 546-47, ratings from Tables 17-5, 17-6 and 17-10 that cannot be used in conjunction with Table 17-33.[17] Dr. Bright declined to submit a revised rating correctly based on the A.M.A., Guides. The Office then referred appellant to Dr. Rogers for an evaluation properly based on the A.M.A., Guides.

Dr. Rogers found that appellant had a 19 percent impairment of the whole person that included 10 percent for deformity based on Table 17-33 at pages 546-47 of the A.M.A., *Guides*, fifth edition, 7 percent for gait derangement based on Table 17-5 at page 529 and 2 percent for atrophy based on Table 17-8 at page 532. He stated:

> "If this [rating] must be for the lower extremity, one can back calculate this using Table 17.3 on page 527.… Gait derangement is 7 percent of the whole person and on using that table, a 7 percent impairment [of the whole person] is 17 percent of the lower extremity. Weakness is a two percent of the whole person which translates to a minimum of four percent of the lower extremity. Table 17-33 on page 546 … gives a 26 percent impairment [of the lower extremity] for the amount of valgus deformity [appellant] has. This would translate to a 47 percent partial permanent impairment of the lower extremity."

[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] *Id*.

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[16] As noted above, the Act does not provide for permanent impairment for the whole person.

[17] *See* A.M.A., *Guides* at 526, Table 17-2.

The Office medical adviser reviewed Dr. Rogers' report and stated:

> "[Appellant] has a 26 percent PPI [permanent partial impairment] [of the] LLE [left lower extremity] based on … [left] tibia valgus angulation of 13 [degrees]…. Based on Table 17-2 [at page] 526, A.M.A., *Guides,* fifth edition, DBE cannot be combined with other impairment as listed above (cross-usage chart). Therefore, based on A.M.A., *Guides,* [at page] 546, Table 17-33, the pathologic angulation of fracture of 13 degrees equals 26 percent PPI LLE which converts to 10 percent PPI whole person. Therefore, based on October 26, 2004 [second opinion] report, [appellant] does not have a greater than 20 percent PPI rating."

The fifth edition of the A.M.A., *Guides* points out that DBE may be used to evaluate lower extremity impairments caused by various surgical procedures.[18] Table 17-2 provides that a DBE evaluation covers gait derangement muscle atrophy and strength, and range of motion and therefore separate impairment percentages should not be added to a DBE based on Table 17-33 at page 546-47 of the A.M.A., *Guides,* fifth edition.[19] Applying these points to Table 17-33, which covers a variety of conditions affecting the lower extremity, the Office medical adviser considered Dr. Rogers description of appellant's impairment.[20] He determined that appellant had a 26 percent impairment of the left lower extremity but he then converted this to the whole person equivalent, 10 percent[21] and concluded had appellant had no more than a 20 percent impairment of the left lower extremity for which he had received a schedule award. However, the Office medical adviser did not correctly apply the A.M.A., *Guides.* It is unclear why the Office medical adviser stated that appellant had a 26 percent impairment of the lower extremity but then indicated later in his report that he had no more than a 20 percent impairment. The Board finds that appellant has a 26 percent permanent impairment of the left lower extremity based on the medical evidence of record.

CONCLUSION

The Board finds that appellant has a 26 percent impairment of the left lower extremity. On remand, the Office should grant him an additional schedule award based on a 6 percent impairment (26 percent minus the 20 percent previously awarded).

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

[19] *Id.*

[20] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (these procedures contemplate 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, especially when there is more than one evaluation of the impairment present).

[21] As noted above, the Act does not provide for permanent impairment for the whole person.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2004 is as modified, to find a 26 percent impairment to the left lower extremity, the case is remanded for further action consistent with this decision.

Issued: June 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member