U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TED BROOKS and U.S. POSTAL SERVICE,
POST OFFICE, West Carrollton, Ohio

Docket No. 96-2593; Submitted on the Record;
Issued September 8, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established that he sustained a permanent partial impairment of his right lower extremity, thus entitling him to a schedule award.

The Board has carefully reviewed the record and finds that this case is not in posture for decision.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for the permanent impairment of specified bodily members, functions, and organs. However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[3] The method used in making such determinations rests in the sound discretion of the Office of Workers' Compensation Programs.[4] For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[5]

While appellant has the burden of establishing entitlement to compensation when the Office has undertaken the development of either factual or medical evidence, proceedings under the Act

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[1] 5 U.S.C. § 8101 *et seq.* (1974); 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[4] *George E. Williams*, 44 ECAB 530, 532 (1993).

[5] *James J. Hjort*, 45 ECAB 595, 599 (1994).

are not adversarial, and the Office has an obligation to see that justice is done.[6] Thus, the Office may not completely disregard medical opinions of diminished probative value but rather must further develop the record.[7]

In this case, appellant, then a 27-year-old letter carrier, filed a notice of traumatic injury on March 12, 1991, claiming that while delivering mail, he stepped on a small rock and felt his right knee pop out. The Office accepted the claim for a right knee strain and medial meniscus tear, and appellant underwent anterior cruciate ligament reconstruction on May 28, 1991.

Subsequently, on March 7, 1994, the Office asked appellant's treating physician, Dr. Paul A. Nitz, a Board-certified orthopedic surgeon, to determine the extent of permanent partial impairment resulting from appellant's right meniscus tear. In a report dated March 28, 1994, Dr. Nitz stated that the date of maximum medical improvement was April 19, 1993, that appellant had retained active flexion of 135 degrees and extension of 10 degrees, that a prosthesis was not required for knee stability, that there was no impairment due to weakness, atrophy, pain or discomfort, and that appellant had a 0 percent impairment rating.

On June 8, 1994 the Office denied appellant's claim for a schedule award. Appellant timely requested a hearing, which was held on February 3, 1995. On May 2, 1995 the hearing representative denied the claim on the grounds that appellant had submitted no medical evidence in support of a schedule award.

Appellant timely requested reconsideration and submitted medical reports dated July 31, 1995 from Dr. I Vidu, an orthopedic practitioner, and March 26, 1996 from Dr. Jeffrey J. Fierra, Board-certified in radiology. On July 25, 1996 the Office denied appellant's request on the grounds that the evidence was insufficient to warrant modification of its prior decision.

In determining his impairment rating, Dr. Nitz failed to address the accepted injury of right medial meniscus tear. Thus, he did not respond directly to the Office's question. While Dr. Vidu's impairment rating was compiled using the incorrect edition of the A.M.A., *Guides*, he found 10 percent impairment for appellant's torn meniscus with partial menisectomy.[8] Dr. Fierra relied on the correct edition of the A.M.A., *Guides* and also addressed the torn meniscus but found a two percent impairment.

The Board finds that Dr. Nitz' impairment rating is incomplete because he did not consider any impairment from appellant's menisectomy and the A.M.A., *Guides* specifically

[6] 20 C.F.R. § 10.110(b); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[7] *Delores C. Ellyett*, 41 ECAB 992, 995 (1990).

[8] Office procedures direct the use of the third edition, revised of the A.M.A., *Guides*, for schedule awards determined between September 1, 1991 and October 31, 1993. The record does not reveal why no schedule award determination was not sought until March 7, 1994, almost three years after appellant's knee surgery.

provides in Table 64 of the appropriate edition[9] that a medial menisectomy may produce a one to three percent impairment. While the medical reports submitted by appellant in support of reconsideration are insufficient to meet his burden of proof in establishing entitlement to a schedule award, this evidence requires further development by the Office in light of the omission of appellant's menisectomy from Dr. Nitz' report. Therefore, the Board will set aside the Office's July 25, 1996 decision and remand this case for a second opinion on the extent of impairment of appellant's right lower extremity.[10]

After such further evidentiary development as the Office deems necessary, the Office shall issue a *de novo* decision.

The July 25, 1996 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
September 8, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] FECA Bulletin No. 94-4 provides that the effective date of the fourth edition of the A.M.A., *Guides* was November 1, 1993. Table 64 provides percentage impairment ratings for a variety of diagnosed conditions of the pelvis, hips, and lower extremities.

[10] *See Richard E. Konnen*, 47 ECAB ___ (Docket No. 94-1158, issued February 16, 1996) (finding that while the medical reports submitted by appellant were insufficient to meet his burden of proof, the Office could not completely disregard medical opinions of diminished probative value but rather must further develop the record).