

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN GOMEZ and DEPARTMENT OF HEALTH & HUMAN SERVICES,
HSA -- INDIAN HEALTH SERVICES, Albuquerque, NM

*Docket No. 98-1752; Submitted on the Record;
Issued January 7, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has greater than a 58 percent permanent impairment of his right lower extremity for which he received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for bilateral torn medial meniscus, right knee osteotomies and left knee arthroscopy due to the November 8, 1978 employment injury. The Office also accepted appellant's claim for a right patellar division and a tibial fibula division.

By decision dated October 26, 1994, the Office granted appellant a schedule award for a two percent permanent loss of use of the left lower extremity. By decision dated April 4, 1996, the Office granted appellant a 14 percent additional impairment to the left lower extremity. The Office also granted appellant an award for a 58 percent permanent impairment of the right leg. By decision dated November 7, 1995, the Office denied compensation in addition to the 58 percent already awarded for the right lower extremity.

By letter dated November 2, 1996, appellant requested reconsideration of the Office's November 7, 1995 and April 4, 1996 decisions.

By decision dated January 8, 1997, the Office denied appellant's reconsideration request.

On January 31, 1997 the Office approved the right proximal tibial osteotomy procedure.

Appellant subsequently underwent surgery and sought an increase in his schedule award. The Office referred appellant to the district medical adviser who used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994) to determine that appellant had a current impairment of 30 percent to the right lower extremity.

Appellant submitted progress notes from Dr. Thomas G. Grace, a Board-certified orthopedic surgeon and his treating physician, dated from September 2 through December 3,

1997. In his September 2, 1997 progress note, Dr. Grace stated that it has been six months since appellant had undergone a high tibial osteotomy and a partial lateral meniscectomy. In his October 24, 1997 progress note, Dr. Grace stated that he was reluctant to give appellant an impairment rating because he had regressed.

In his December 3, 1997 progress note, Dr. Grace found that appellant's range of motion had "pretty much" stabilized, and that appellant reached maximum medical improvement "arbitrarily" on December 2, 1997. He opined that appellant had a permanent impairment rating of 3 percent of the whole person based on a narrow cartilage interval of 3 millimeters and an impairment rating of 4 percent of the whole person based on a partial lateral meniscectomy. Dr. Grace opined that appellant had an impairment rating of 10 percent of the whole person based on a proximal tibial osteotomy, and that he had a combined impairment rating of 20 percent of the whole person which translated to a 42 percent impairment of the lower extremity.

By decision dated January 20, 1998, the Office found that appellant was not entitled to an award greater than a 58 percent impairment to his right lower extremity based on the district medical adviser's opinion.

The Board finds that appellant has no greater than a 58 percent impairment of his right lower extremity.

The schedule award provision of the Federal Employees' Compensation Act¹ 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.² 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.³

In the present case, the district medical adviser used the A.M.A., *Guides* (4th ed. 1994) to determine that appellant had a 30 percent impairment to the right lower extremity. In his December 3, 1997 opinion, Dr. Grace determined that appellant had a combined impairment rating of 20 percent of the whole person which translated to a 42 percent impairment of the lower extremity. Dr. Grace's opinion, however, is of diminished probative value because he did not use the A.M.A., *Guides*. He also, however, did not rate appellant more than 58 percent impaired to his right lower extremity. Appellant has therefore failed to establish that he had more than a 58 percent impairment to his right lower extremity.

¹ 5 U.S.C. § 8107 *et seq.*

² *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Daniel C. Goings*, 37 ECAB 781, 783 (1986).

³ *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

The decision of the Office of Workers' Compensation Programs dated January 20, 1998 is hereby affirmed.⁴

Dated, Washington, D.C.
January 7, 2000

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁴ Because appellant filed his appeal more than one year after the Office's October 26, 1994 and April 4, 1996 merit decisions were issued granting an award for appellant's left lower extremity, the Board does not have jurisdiction over those decisions; *see Jeanette Butler*, 47 ECAB 128, 129-30 (1995).