

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLE L. ORTEGA and DEPARTMENT OF THE ARMY,
Fort Dix, NJ

*Docket No. 02-61; Submitted on the Record;
Issued September 11, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a 15 percent permanent impairment of the right leg.

In the prior appeal of this case,¹ the Board set aside the February 2, 1999 decision of the Office of Workers' Compensation Programs and remanded the case for a referee opinion on the extent of the permanent impairment to appellant's right leg.²

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Howard Zeidman, a Board-certified orthopedic surgeon. In a report dated November 29, 2000, Dr. Zeidman indicated that he examined appellant on November 20, 2000. He related her history and complaints. Dr. Zeidman reviewed medical records and the statement of accepted facts. Findings on examination included the following: a right calf and thigh that measured one-half inch less in circumference than the left; good extension in both knees; 95 degrees of flexion on the right; ligaments intact; no effusion; quadriceps strength weak in both; and inability to sustain extension against force. X-rays showed some arthritis and narrowing in the patellofemoral joints bilaterally. Dr. Zeidman noted that appellant showed evidence of continuing and progressive arthritis with limitation of motion and weakness in the knees.

¹ Docket No. 99-1524 (issued September 27, 2000) (order remanding case).

² The facts of this case as set forth the Board's prior order and in the Office's February 2, 1999 decision are hereby incorporated by reference.

Dr. Zeidman reported that appellant had a full recovery from the dislocation noted in 1989.³ He added: “[Appellant] has not had any more dislocations, but the arthritis is certainly a direct result of that problem.” On the issue of impairment, Dr. Zeidman reported:

“The impairment at this time then, is the limitation of motion, weakness and the accompanying pain limiting her ability to function fully. There is no evidence of neurologic loss. I have already considered the questions of atrophy and range of motion problems.

“Turning now to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, [appellant] has evidence of atrophy, weakness and limitation of motion. From [T]able 37, we would find the atrophy providing 5 percent of loss was related to both the thigh and calf. From [T]able 38, the grading would be that of a [G]rade 4, which transposed to [T]able 39 would be a 17 percent loss.

“From [T]able 41, the range of motion would be considered as mild, resulting then in 10 percent loss. Sum total of these problems would be 37 percent.

“[Appellant] does have pain as indicated.

“The quadriceps atrophy has been described and is considered in these measurements.”

On December 14, 2000 an Office medical adviser reviewed Dr. Zeidman’s findings, including thigh and calf measurement, quadriceps weakness and right knee flexion to 110 degrees and determined that appellant had an 8 percent impairment of both the thigh and calf under Table 37, page 77, of the A.M.A., *Guides*, (4th ed. 1993). Using the Combined Values Chart at page 322, the medical adviser reported that appellant had a 15 percent impairment of the right leg.

In a decision dated January 16, 2001, the Office found that the opinion of the referee medical specialist represented the weight of the medical evidence and failed to establish that appellant had more than a 15 percent permanent impairment of the right leg.

The Board finds that this case is not in posture for decision. Clarification is needed from the referee medical specialist.

Section 8107 of the Federal Employees’ Compensation Act⁴ authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.⁵

³ The Office had accepted appellant’s claim for fracture and dislocation of the right patella.

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

Dr. Zeidman, the referee medical specialist, noted 95 degrees of flexion on the right. Table 41, page 78, indicates that knee flexion between 80 and 110 degrees represents a 10 percent impairment of the lower extremity, as Dr. Zeidman reported.

Dr. Zeidman also reported that appellant's right thigh and calf measured one-half inch less in circumference than the left. According to Table 37, page 77, of the A.M.A., *Guides*, a one-half inch difference in circumference (1.27 centimeters) represents a 3 to 8 percent impairment of the lower extremity. Dr. Zeidman assigned five percent for the thigh and five percent for the calf. As he was the examining physician, his opinion takes precedence over that of the Office medical adviser, who selected the maximum eight percent for each.⁶

Dr. Zeidman further estimated impairment based on manual muscle testing. He reported quadriceps weakness and an inability to sustain extension against force. Using Table 38, page 77, he graded appellant's muscle function as Grade 4, or "Active movement against gravity with some resistance." Table 39, page 77, indicates that a Grade 4 function of knee extension represents a 12 percent impairment of the lower extremity. Dr. Zeidman reported a 17 percent impairment, which could represent a Grade 4 function of hip extension. Because the accepted employment injury is a fracture and dislocation of the right patella, it is presumed that he addressed knee extension, but clarification is required on this point.

Clarification is also required on a broader point: The A.M.A., *Guides* cautions:

"Diminished muscle function should be estimated under *only one* of several parts of this chapter, relating to gait derangement (p. 75), muscle atrophy (p. 76), manual muscle testing (p. 76), or peripheral nerve injury.

"The evaluating physician should determine which method and approach best applies to [appellant's] impairment and use the most objective method that applies."⁷

When the Office secures an opinion from a referee medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the referee's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second referee specialist for a rationalized medical opinion on the issue in question.⁸ Unless the Office carries out this procedure, the intent of section 8123(a)

⁶ *John Keller*, 39 ECAB 543 (1988) (the Office medical adviser, as the nonexamining physician, cannot select a percentage without explanation or reference to the examining physician's findings); *Ronnie V. Jones*, Docket No. 90-1149 (issued February 11, 1991) (opinion of the examining physician takes precedence where the A.M.A., *Guides* requires subjective judgment on the percentage of impairment).

⁷ A.M.A., *Guides* at 76.

⁸ See *Nathan L. Harrell*, 41 ECAB 345 (1990).

of the Federal Employees' Compensation Act⁹ will be circumvented when the report of the referee medical specialist is insufficient to resolve the conflict of medical evidence.¹⁰

The Board will set aside the Office's January 16, 2001 decision and remand the case for a supplemental report from the referee medical specialist, Dr. Zeidman, who should explain whether muscle atrophy or manual muscle testing better describes appellant's diminished muscle function. If the latter, he must clarify how he obtained 17 percent from Table 39, page 77. The Office may invite Dr. Zeidman to use the Combined Values Chart at page 322 to combine the 10 percent impairment for loss of motion with either the reported impairments for muscle atrophy or the impairment for muscle weakness.¹¹ Following such further development as may be necessary, the Office shall issue an appropriate final decision on whether appellant has more than a 15 percent permanent impairment of the right leg.

The January 16, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
September 11, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁹ 5 U.S.C. § 8123(a) provides the following: "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

¹⁰ *Harold Travis*, 30 ECAB 1071 (1979).

¹¹ FECA Bulletin No. 95-17 (issued March 23, 1995), which lists tables that are mutually exclusive, gives no indication that Table 41, relating to knee motion, will create an inflated impairment estimate when used together with Table 37, relating to muscle atrophy, or with Table 39, relating to muscle weakness.