

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN CLEAVER and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 02-1886; Submitted on the Record;  
Issued January 3, 2003*

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DECISION and ORDER

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

The issue is whether appellant has more than a 37 percent loss of use of his left leg.

On August 8, 1989 appellant, then a 54-year-old rigging foreman, filed a traumatic injury claim alleging that he stepped into a depression in the blacktop and sustained an injury to his left knee. The Office of Workers' Compensation Programs accepted appellant's claim for torn left medial meniscus for which surgery was authorized and performed. Appellant received compensation for appropriate periods of wage loss.

This case was previously on appeal before the Board.<sup>1</sup> The relevant facts are set forth in the November 15, 2000 decision. The Board set aside the July 21, 1999 Office decision and remanded the case to obtain a supplemental opinion from Dr. David R. Pashman, a Board-certified surgeon, rating appellant's permanent loss of use of the left leg using the appropriate tables for a total knee replacement.

By decision dated January 19, 2001, the Office denied that appellant had greater than 37 percent impairment of the left lower extremity.

By letter dated January 30, 2001, appellant, through his representative, requested a hearing.

By decision dated May 1, 2001, the Office hearing representative remanded the case for additional development and issuance of a decision. The Office hearing representative indicated that the Office must obtain a supplemental report from Dr. Pashman and advise him that the Office approved a total knee replacement, and this should be a factor in his impairment rating. It should further advise him to rate the impairment of appellant's left lower extremity, rather than

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<sup>1</sup> Docket 00-406.

the whole person. Further, he advised that, when the Office has obtained a supplemental report from Dr. Pashman, it should issue a *de novo* decision.

By letter dated June 11, 2001, the Office requested a supplemental report from Dr. Pashman.

In a June 15, 2001 supplemental report, Dr. Pashman advised the Office that they were no longer utilizing the fourth edition but were using the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). He advised that, on page 549, Table 17-35, there is noted waiting for knee replacement results modified from the Insol Knee Rating System and with regard to pain, appellant noted stiffness in the knees, left worse than the right and discomfort with prolonged walking. Dr. Pashman indicated that the number of points would be 45 and appellant's primary pain was from his claudication. He noted that, on physical examination, appellant had approximately 110 degrees of knee flexion bilaterally, which would be 21 points, the knee was quite stable with less than 5 millimeters of anterior-posterior instability and 5 degrees of medial and lateral, indicating 25 points. Dr. Pashman noted that there was no flexion contracture, nor was there an extensor lag and there was excellent alignment, totaling 91 points. He indicated that, on Table 17-33, it was indicated that a good result of 85 to 100 points would be 15 percent whole person impairment. Dr. Pashman stated that, in view of the fact that this is bilateral, it would be 30 percent impairment of the person as a whole; however, as indicated on page 7 of his June 24, 1999 report, he opined that this was an excessive level of disability based on the impairment guidelines, since appellant was much more functional than he would be with degenerative disease.

By memorandum dated August 17, 2001, an Office medical adviser reviewed the supplemental report of Dr. Pashman and concurred that appellant had no greater than a 37 percent impairment of the left lower extremity. He also advised that the results were the same under either version of the fourth or fifth edition of the A.M.A., *Guides*.

By decision dated August 21, 2001, the Office determined that the weight of medical evidence established that appellant had no greater than 37 percent impairment of the left lower extremity.

By letter dated August 24, 2001, appellant's representative requested a hearing, which was held on January 24, 2002.

By decision dated April 8, 2002, the Office hearing representative affirmed the August 21, 2001 decision and found that the weight of the medical evidence was insufficient to establish that appellant was entitled to greater than 37 percent permanent impairment of the left lower extremity.

The Board finds that appellant has no more than a 37 percent loss of use of his left leg.

The schedule award provisions of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</sup> 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 uniform standards applicable to all claimants. The A.M.A., *Guides* (5<sup>th</sup> ed. 2001), has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>4</sup>

The Office accepted appellant's claim for a torn left medial meniscus and authorized a left knee arthroscopy.

The medical evidence reflects that a conflict in medical evidence existed between the opinions of Dr. John Potash, a Board-certified surgeon and Dr. Steven Valentino, a Board-certified osteopathic orthopedic surgeon, which necessitated referral of appellant to the impartial medical specialist, Dr. Pashman, a Board-certified orthopedic surgeon.<sup>5</sup> The case was remanded for the Office to advise Dr. Pashman that the surgery was part of the accepted claim and he was advised to provide additional rationale for his opinion regarding whether appellant was entitled to greater than a 37 percent impairment to the left lower extremity. The Board finds that the weight of the medical evidence rests with Dr. Pashman, who submitted a thorough medical opinion based upon a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant had no greater than a 37 percent impairment to the left lower extremity. Dr. Pashman, in his supplemental report of June 15, 2001, was advised that appellant's total knee replacement was work related and he indicated that appellant had a total impairment of 91 points, which he concluded in light of the fact that this was bilateral, would amount to a 30 percent permanent impairment of the person as a whole. Further, the Office medical adviser concurred that appellant would not be entitled to greater than a 37 impairment and interpreted that, using either A.M.A., *Guides*, the fourth or fifth editions, they would reflect appellant's entitlement to no greater than a 37 percent permanent impairment.

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup> The Board finds that the report of Dr. Pashman

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<sup>2</sup> 5 U.S.C. § 8107 *et seq.*

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

<sup>5</sup> 5 U.S.C. § 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes*, 43 ECAB 510 (1992).

<sup>6</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

represents the weight of medical opinion in this case and contains a well-rationalized opinion based on the proper edition of the A.M.A., *Guides*. The Board, therefore, affirms the Office's finding that appellant has no greater than a 37 percent permanent impairment of the left lower extremity due to his accepted work injury.

The April 8, 2002 and August 21, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
January 3, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member