

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSE B. HOZEY and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Safford, AZ

*Docket No. 03-668; Submitted on the Record;
Issued June 10, 2003*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof to establish that he has more than a two percent permanent impairment of his right lower extremity.

On August 5, 1991 appellant, then a 39-year-old physician's assistant, filed a notice of traumatic injury and claim for compensation alleging that he twisted his right knee while trying to get supplies off a shelf. The claim was accepted for right knee sprain, internal derangement and a partial medial meniscectomy was authorized and performed on June 10, 1999.

In a March 9, 2000 report, Dr. Jody Daggett, an attending Board-certified orthopedic surgeon, wrote that appellant presented with persistent right knee pain. She found the knee was fully functional and added that appellant performs all activities, though he experienced problems when distance running. On examination Dr. Daggett found no effusion, full range of motion, minimal tenderness, negative McMurray's, good stability and excellent musculature.

In a January 19, 2001 report, Dr. Richard Lucio, a Board-certified radiologist, found small joint effusion and degenerative change in the posterior horn of the medial meniscus, with a suggestion of a hairline horizontal tear through the posterior horn.

In a June 13, 2001 report, Dr. Daggett wrote that appellant presented with persistent pain not due to further meniscus tearing but due to periarticular fibrosis and persistent knee effusion after surgery. On examination she found a tenderness along the medial joint line, less so on the lateral joint line and some pain with McMurray's testing, full range of motion in extension, but a lack of about 10 to 15 degrees flexion. Dr. Daggett reported that a magnetic resonance imaging (MRI) scan gadolinium demonstrated postsurgical changes only. She recommended closure of the industrial claim with permanent impairment rating based upon the loss of meniscus tissue as described. Dr. Daggett wrote that appellant had "an impairment rating of 1 percent of the whole person or 2 percent of the lower extremity based upon the loss of meniscus tissue and 4 percent of the whole person or 10 percent of the lower extremity based upon the loss of flexion. This will give a total impairment of the whole person of 5 percent and of the lower extremity of 12

percent... [Appellant] can anticipate further deterioration of his condition due to loss of meniscus tissue.”

Appellant filed for a schedule award and, in an October 11, 2002 memorandum, the district medical adviser was asked to indicate the permanent functional loss of use of the right lower extremity and the date of maximum medical improvement.

In an October 21, 2002 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon, to whom the Office sent appellant’s records, wrote that after applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), (A.M.A., *Guides*):

“[Appellant] has a residual impairment for having undergone partial medial meniscectomy, resulting in two percent impairment of the right lower extremity (Table 17-33/ page 546). Although [he] has some loss of knee flexion, this is not a ratable impairment, based on the A.M.A., *Guides* (Table 17-10/page 537). As such [appellant] has two percent impairment of the right lower extremity. The two percent impairment of the right lower extremity is the sole impairment of the right lower extremity resulting from the accepted work injury of August 3, 1991. The date of maximum medical improvement is June 13, 2001, when [appellant] was seen most recently for evaluation by Dr. Daggett.”

In a November 1, 2002 decision, the Office found appellant entitled to a two percent schedule award for the permanent impairment of his right lower extremity.

The Board finds that appellant has not met his burden of proof to establish that he has more than a two percent permanent impairment of his right lower extremity. An employee seeking compensation under the Federal Employees’ Compensation Act¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,² including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.³

The schedule award provision of the Act⁴ and its implementing regulation⁵ 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

¹ 5 U.S.C. §§ 8101-8193.

² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404 (1999).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁶

In a June 13, 2001 report, Dr. Daggett found an impairment rating of 1 percent of the whole person or 2 percent of the lower extremity based upon the loss of meniscus tissue and 4 percent of the whole person or 10 percent of the lower extremity based upon the loss of 10 to 15 degrees flexion, resulting in a total impairment of the lower extremity of 12 percent. This report, based on Table 17-33, page 546, shows appellant with a two percent impairment due to the diagnosis based rating for partial medial meniscectomy. Although Dr. Daggett indicated a loss of 10 to 15 degrees flexion, the Board cannot determine a flexion based rating because it is not possible to determine where appellant's actual flexion falls within the standards of Table 17-10, page 537 of the A.M.A., *Guides*.⁷

Dr. Harris, a Board-certified orthopedic surgeon, to whom the Office sent appellant's records, correctly found that Dr. Daggett's report can only sustain a two percent rating based on the partial medial meniscectomy. He properly concluded that no further rating can be derived from Dr. Daggett's report and the A.M.A., *Guides*. Appellant did not submit any medical evidence showing that he had a greater impairment. Therefore, the Office correctly found that appellant was entitled to a schedule award for a two percent impairment of his right lower extremity.

The November 1, 2002 decision by the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ See *id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁷ Dr. Daggett did not provide any actual flexion measurements.