

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAZARUS E. JACKSON and DEPARTMENT OF THE ARMY,
CONSOLIDATED PROPERTY BOOK BRANCH, Fort Dixon, N.J.

*Docket No. 96-2133; Submitted on the Record;
Issued July 14, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has greater than a 5 percent permanent impairment to his left lower extremity for which he received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for internal derangement to the left knee. On February 21, 1992 appellant filed a claim for a schedule award.

By decision dated June 12, 1992, the Office denied appellant's claim, stating that the evidence of record failed to establish the existence of a permanent impairment as alleged.

Appellant subsequently requested a hearing and submitted a medical report dated August 17, 1992 from Dr. Ronald Goldberg, an osteopath. In his report, Dr. Goldberg determined that the decreased range of motion in flexion of appellant's left knee was 90 degrees or a 21 percent impairment of the left lower extremity. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* but not specifying which edition, he stated that based on Table 40 appellant had a 5 percent impairment for a torn meniscus, and stated that for one meniscus and arthritis due to any cause including trauma and chondromalacia, appellant had a 20 percent impairment of the left lower extremity. He concluded, adding the three percentages of impairment, that appellant had a 46 percent (20% + 21% + 5 %) permanent impairment to his left lower extremity.¹

By decision dated November 25, 1992, the Office hearing representative stated that the case was not in posture for a hearing at that time because it was necessary, in view of Dr. Goldberg's August 17, 1992 opinion that appellant had a 46 percent permanent impairment of the left lower extremity, to remand the case for the Office to obtain a second opinion examination by a Board-certified orthopedic surgeon. The Office stated that the specialist

¹ Dr. Goldberg also provided an impairment rating for appellant's right upper extremity but that is the subject of another claim, File No. A3-633159.

should determine whether appellant had any permanent partial impairment of his left leg related to the May 8, 1979 employment injury, and if so, provide a rating using the A.M.A., *Guides*. Further, the Office should refer the specialist's report to an Office medical adviser to assess the nature and percentage of permanent impairment. The Office stated that a *de novo* decision should then be issued.

In a report dated February 1, 1994, Dr. David A. Bundens, a second opinion physician and a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed results of a 1992 magnetic resonance imaging (MRI) scan. He found that appellant had range of motion from 0 to 135 degrees of flexion and crepitation beneath the patella as well as a positive patella femoral compression test. He stated that appellant's 135 degrees of motion would give him a 5.5 percent permanent disability rating, and the arthritis in his knee would give him up to 20 percent "according to deformity." He stated that he would give appellant a 10 percent impairment for his arthritis. He concluded that appellant had a 15.5 percent permanent impairment to his left lower extremity.

In a report dated March 9, 1994, using the A.M.A., *Guides* (4th ed. 1994), the district medical adviser noted that based on Dr. Bundens' February 1, 1994 report appellant's left knee had flexion of 0 to 135 degrees which equated to a 0 percent impairment based on Table 41, page 78, and appellant had arthritis and crepitation of the patellofemoral joint which equated to a 5 percent impairment based on Table 62, page 83. He concluded that appellant had a 5 percent permanent impairment to his left lower extremity.

By decision dated March 14, 1994, the Office awarded appellant a schedule award for a 5 percent permanent impairment to his left lower extremity.

On September 28, 1994 appellant requested an oral hearing before an Office hearing representative which was held on December 23, 1994. Appellant submitted additional medical evidence. In a report dated July 22, 1994, Dr. Mark J. Reiner, an osteopath, considered that appellant injured his knee 13 years ago, performed a physical examination, and diagnosed internal derangement to the left knee, probably medial meniscal treating and probable arthritis. A May 6, 1992 MRI showed small effusion, Type II signal posterior medial meniscus and medial subluxation of the patella with early degenerative chondromalacia. In a report dated August 11, 1994, Dr. Reiner diagnosed arthritis to the left knee. At the hearing, appellant testified that his left knee had gotten worse and he was in constant pain. He wore a brace and had limited motion.

The Office submitted the entire record to another district medical adviser for an evaluation. On March 28, 1995 the district medical adviser stated that appellant had a 5 percent rating for patellofemoral pain and crepitation and therefore a 5 percent permanent impairment to his left knee based on Table 62, page 83 of the A.M.A., *Guides* (4th ed. 1994). On May 12, 1995 the Office medical director concurred.

By decision dated June 12, 1995, the Office hearing representative affirmed the Office's March 14, 1994 decision.

By letter dated January 2, 1996, appellant requested reconsideration of the Office's decision and submitted a medical report dated November 30, 1995 from Dr. David Weiss, an

osteopath. In his report Dr. Weiss considered appellant's history of injury, performed a physical examination, and reviewed MRI scans dated May 1, 1992 and August 1, 1994. He stated that the August 1, 1994 MRI scan showed, *inter alia*, moderate to severe loss of articular cartilage along the medial joint compartment and the patellofemoral joint, elongated patellar tendon with a high patellar position and slight medial subluxation of the patella. Dr. Weiss' diagnoses included post-traumatic chondromalacia patella and post-traumatic osteoarthritis of the left knee. Using the A.M.A., *Guides* (4th ed. 1994), he rated appellant 5 percent impaired for patellofemoral arthritis based on Table 62, page 83, and 17 percent impaired for muscle strength deficit of 3/5 based on Table 39, page 77, which resulted in a total permanent impairment to appellant's left knee of 22 percent (5 % + 17 %).

By decision dated April 10, 1996, the Office denied appellant's reconsideration request.

The Board finds that the case is not in posture for decision due to an unresolved conflict in the medical evidence.

The schedule award provision of the Federal Employees' Compensation Act² 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.³ 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.⁴

In the present case, appellant's treating physician, Dr. Goldberg rated appellant's left lower extremity 46 percent permanently impaired but did not indicate which edition of the A.M.A., *Guides* he used and the second opinion physician, Dr. Bundens rated appellant's left lower extremity 15.5 percent permanently impaired but made no reference to the A.M.A., *Guides*. It is well settled that when a physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based on the application of the A.M.A., *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.⁵ Board cases are clear that if a physician does not utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment.⁶ For this reason, the Board finds that Dr. Goldberg's August 17, 1992 opinion and Dr. Bundens February 1, 1994 opinion rating appellant's left lower extremity

² 5 U.S.C. § 8107 *et seq.*

³ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

⁴ *Arthur E. Anderson*, *supra* note 3 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁵ *Paul R. Evans*, 44 ECAB 646, 651 (1993); *see Ronald J. Pavlik*, 33 ECAB 1596 (1982).

⁶ *Paul R. Evans*, *supra* note 5 at 651; *Thomas P. Gauthier*, 34 ECAB 1060, 1063-64 (1983).

46 percent and 15.5 percent permanently impaired, respectively, are of little probative value. Dr. Reiner's July 22 and August 11, 1994 reports are also not probative because Dr. Reiner did not make an impairment rating and he did not use the A.M.A., *Guides*.⁷

The medical opinion of the district medical advisor, however, is also not probative because he did not properly use the A.M.A., *Guides*. In his March 9, 1994 opinion, the district medical adviser rated appellant 5 percent permanently impaired based on Dr. Bundens' finding that appellant had arthritis and crepitation in the patella, citing Table 62, page 83 of the A.M.A., *Guides* (4th ed. 1994). That table of the A.M.A., *Guides*, however, is entitled "Arthritis Impairment Based on Roentgenographically Determined Cartilage Intervals" and, as indicated in the introductory paragraph, specifically requires a roentgenogram for making a determination using Table 62 and states the precise distance appellant should be from the machine and the angle the view should be taken.⁸ While the record does contain results of two MRIs dated May 9, 1992 and August 1, 1994 it does not contain the requisite x-ray films on which to base an impairment rating using Table 62, page 83. For the same reason, the March 28, 1995 opinion of the district medical adviser's and the medical director's May 12, 1995 concurrence that appellant has a 5 percent permanent impairment based on Table 62, page 83 are also not probative.

In his November 30, 1995 opinion, Dr. Weiss concluded that appellant had a permanent impairment of 22 percent based on the 5 percent impairment of arthritis based on Table 62, page 83 and of 17 percent impairment based on strength deficit based on Table 39, page 77. That part of his opinion using Table 62, page 83 is not probative for reasons stated above. Dr. Weiss' opinion, however, creates a conflict in the evidence as he found on physical examination that appellant had a muscle strength deficit and Dr. Bundens and Dr. Goldberg did not make any findings that appellant had a muscle strength deficit. Further, a conflict exists in the record between Dr. Bundens' finding on examination that appellant had 135 degrees of flexion and Dr. Goldberg's finding that appellant had flexion of 90 degrees. To resolve the conflicts in the medical evidence regarding the degree of appellant's flexion and whether appellant has a strength deficit, and to obtain a proper rating using the A.M.A., *Guides* (4th ed. 1994), the case should be referred for an impartial medical specialist to evaluate appellant and the case record, obtaining additional x-rays if necessary, and determine the degree of appellant's permanent impairment, if any. A district medical adviser should then review the results and make a rating. Upon further development, a *de novo* decision should be issued.

⁷ See *id.*

⁸ A.M.A., *Guides*, pages 82 and 83.

Accordingly, the decision of the Office of Workers' Compensation Programs dated April 10, 1996 is vacated and the case is remanded for further proceedings consistent with this decision of the Board, to be followed by a *de novo* decision.

Dated, Washington, D.C.
July 14, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member