

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK L. OLIVER, JR. and DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, Washington, DC

*Docket No. 98-1862; Submitted on the Record;
Issued January 12, 2000*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a 15 percent permanent impairment of his right lower extremity for which he received a schedule award.

On June 7, 1994 appellant, then a 31-year-old park police officer, filed a notice of traumatic injury alleging that he injured his right knee in the course of his federal employment. The Office of Workers' Compensation Programs accepted the claim for a torn meniscus of the right knee and authorized two arthroscopic surgeries. Appellant subsequently filed a claim for a schedule award.

On July 10 and 21, 1997 Dr. Wayne B. Leadbetter, appellant's treating physician and a Board-certified orthopedic surgeon, indicated that appellant had a 30 percent permanent impairment of his right lower extremity. In his report dated May 5, 1997, Dr. Leadbetter stated that his examination revealed a slight laxity of the knee on drawer sign and that x-rays revealed degenerative changes in the lateral compartment. He opined that appellant had cruciate ligament deficient right knee with status postmeniscectomy with Grade IV degenerative osteoarthritis, lateral compartment dominant. Although Dr. Leadbetter concluded that appellant had a 30 percent permanent disability of the right knee, he indicated that he did not rely on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,¹ in reaching his conclusion.

On August 13, 1997 the Office medical adviser reviewed Dr. Leadbetter's reports and found that pursuant to Table 64, page 85, of the A.M.A., *Guides*, his findings established a nine percent permanent impairment of appellant's right lower extremity based on a seven percent permanent impairment due to mild laxity stemming from an anterior cruciate ligament tear and a two percent permanent impairment for a partial lateral meniscectomy. The medical adviser,

¹ A.M.A., *Guides* (4th ed. 1993).

however, indicated that Dr. Leadbetter's findings of arthritis could also be rated, if appropriate x-rays were provided.

On October 16, 1997 the Office referred the case, along with a statement of accepted facts, to Dr. Vincent G. Desiderio, a Board-certified orthopedic surgeon, so that he could perform a second opinion examination and provide an opinion concerning the permanent partial impairment appellant demonstrated pursuant to the A.M.A., *Guides*.

On October 31, 1997 Dr. Desiderio recorded that appellant had degenerative changes in his right knee with a torn lateral meniscus. His examination revealed no laxity of either the collateral or cruciate ligaments. Dr. Desiderio stated that x-rays demonstrated moderate degenerative changes in the lateral compartment and mild degenerative changes in the patellar-femoral compartment. He diagnosed internal derangement, right knee, with a torn lateral meniscus, which was approximately 50 percent removed. Dr. Desiderio found a partial tear of the anterior cruciate ligament causing minimal symptoms and a cartilage defect in the lateral femoral condyle causing some symptoms. He stated that appellant had a permanent impairment of 24 percent based on a 10 percent permanent impairment for a partial meniscectomy pursuant to Table 64, page 85, of the A.M.A., *Guides*, a 7 percent permanent impairment for a mild anterior cruciate ligament injury pursuant to Table 64, page 85, of the A.M.A., *Guides* and a 7 percent impairment for arthritis pursuant to Table 62, page 83 of the A.M.A., *Guides*.

On December 16, 1997 the Office medical adviser found that pursuant to Table 64, page 85, of the A.M.A., *Guides* appellant established a nine percent permanent impairment based on a two percent impairment for his partial meniscectomy and a seven percent impairment for his cruciate ligament laxity. The medical adviser also found appellant established a seven percent permanent impairment due to his arthritis pursuant to Table 62, page 83, of the A.M.A., *Guides*. The medical adviser then utilized the Combined Values Chart of the A.M.A., *Guides* to find that appellant's combined impairment from Tables 62 and 64 was 15 percent.

By decision dated December 29, 1997, the Office found that appellant had a 15 percent permanent impairment of the right lower extremity, which entitled him to a schedule award.

In a letter postmarked February 5, 1998, appellant requested an oral hearing.

By decision dated April 24, 1998, the Office denied appellant's request for a hearing as untimely.

The Board finds that this case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use, of body members listed in the schedule. The Act, however, does

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.304.

not specify the manner in which the percentage of loss of a member shall be determined. The method for making such a determination rests in the sound discretion of the Office. The Office has adopted, and the Board has approved the use of the A.M.A., *Guides* as an appropriate standard for evaluating schedule losses.⁴

In the present case, the Office relied on the December 16, 1997 report of its medical adviser to find that appellant established a 15 percent permanent impairment of his right lower extremity. The Office medical adviser previously indicated in his August 13, 1997 report that appellant could receive an additional impairment rating for arthritis if relevant x-ray evidence was obtained. Dr. Leadbetter, failed to provide this x-ray evidence in his reports dated April 5, July 10 and July 21, 1997. Consequently, the Office referred appellant to Dr. Desiderio. He opined that appellant had a 24 percent impairment rating, which included a 7 percent impairment for arthritis pursuant to Table 62, page 83, of the A.M.A., *Guides*. Dr. Desiderio failed, however, to interpret any x-ray such that it could be related to Table 62, page 83, of the A.M.A., *Guides*, which requires that a physician address the cartilage interval of the joint. Despite the lack of this x-ray evidence, the Office medical adviser appeared to rely on his report to find a 15 percent impairment rating, which included a 7 percent impairment based on the arthritis in appellant's right knee. Accordingly, the Office medical adviser's December 16, 1997 calculation and the Office's schedule award are not factually supported by the medical evidence. The Board, therefore, will remand this case so that the Office can fulfill its obligation of properly developing the medical evidence on the issue of the amount of permanent impairment in appellant's right lower extremity.

⁴ *Kenneth E. Leone*, 46 ECAB 133 (1994).

The December 29, 1997 Office of Workers' Compensation Programs' decision is set aside and this case remanded for further development consistent with this opinion.⁵

Dated, Washington, D.C.
January 12, 2000

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁵ Given the Board's disposition in this case, the issue of whether the Office properly denied appellant's hearing on April 24, 1998 is moot.