

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LEROY LARKINS and U.S. POSTAL SERVICE,  
POST OFFICE, ANACOSTIA STATION, Washington, DC

*Docket No. 98-1220; Submitted on the Record;  
Issued March 14, 2000*

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DECISION and ORDER

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

The issue is whether appellant has more than a two percent permanent impairment of the left lower extremity for which he received a schedule award.

On March 11, 1991 appellant, then a 48-year-old letter carrier, sustained an employment-related torn lateral meniscus of the left knee, which he underwent meniscectomies on October 1, 1991 and May 18, 1993. On February 20, 1996 he filed a schedule award claim. By decision dated August 27, 1996, the Office of Workers' Compensation Programs granted appellant a schedule award for a two percent permanent impairment for loss of use of the left lower extremity for the period May 18 to June 27, 1994 for a total of 5.76 weeks of compensation. On February 17, 1997 appellant requested reconsideration, and by decision dated March 19, 1997, the Office denied his request. Appellant again requested reconsideration on June 12, 1997 and submitted additional medical evidence. Following referral to a second opinion physician, by decision dated January 28, 1998, the Office found that appellant was not entitled to an increased schedule award. The instant appeal follows.

Under section 8107 of the Federal Employees' Compensation Act<sup>1</sup> and section 10.304 of the implementing federal regulations,<sup>2</sup> schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent*

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 20 C.F.R. § 10.304.

*Impairment*<sup>3</sup> have been adopted by the Office and the Board has concurred in such adoption as an appropriate standard for evaluating schedule losses.<sup>4</sup>

The relevant medical evidence includes a September 14, 1995 report from appellant's treating Board-certified orthopedic surgeon, Dr. Joseph T. Crowe, who evaluated appellant's knee and advised that he had flexion of 115 degrees with full extension, minimal tenderness and no effusion or ligamentous laxity. He concluded that appellant had a 10 percent permanent impairment of the left lower extremity. In an attached Office form report, he indicated that appellant was entitled to a six percent impairment for weakness, atrophy, pain or discomfort and advised that appellant had reached maximum medical improvement on September 14, 1995. Dr. Crowe indicated that he had made his findings using Table 64 of the A.M.A., *Guides*.

In a January 31, 1996 report, an Office medical consultant advised that under Table 64 of the A.M.A., *Guides*, appellant was entitled to a two percent impairment rating and had reached maximum medical improvement on May 18, 1994.

Dr. Crowe continued to submit reports and in a May 8, 1997 report advised that, when comparing x-rays done on March 9, 1995 with those done May 8, 1997, the joint space had narrowed to less than one millimeter of height, which would indicate additional disability. He concluded that appellant would need a knee replacement in the future and had a 12 percent permanent impairment of the left lower extremity. In a September 18, 1997 report, Dr. Crowe advised that appellant lacked 35 to 40 degrees of flexion and 5 degrees of extension with moderate to severe crepitus and no laxity or effusion.

Appellant also submitted a May 20, 1997 report from Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, who found that appellant lacked five degrees of full extension with marginal osteophyte formation and synovial boggiess but no true effusion. He noted findings of a one millimeter cartilage interval on the left and diagnosed progressive degenerative arthritis of the left knee, status post medial meniscectomy. Dr. Hanley advised that under Table 62 of the A.M.A., *Guides*, appellant was entitled to a 25 percent impairment for the 1 millimeter interval space plus an additional 2 percent, under Table 64, for the partial meniscectomy.

By letter dated September 12, 1997, the Office referred appellant, along with a set of questions, a statement of accepted facts and the medical record, to Dr. John B. Cohen, for a second opinion evaluation. In an undated report, that was received by the Office on November 17, 1997, Dr. Cohen diagnosed bilateral arthritis of the knee and stated:

“It is clear on [appellant's] initial x-rays that his arthritis was preexisting at the time of his initial complaint. I do not believe his bilateral arthritis is related to his work. Instead, I believe at the most he can be awarded a permanent impairment of one percent to his left lower extremity secondary to his medial meniscal tear. The problem is that meniscal tears are associated with degenerative changes and,

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<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993).

<sup>4</sup> See *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

as Dr. [Charles H.] Epps [Jr.,] [a Board-certified orthopedic surgeon,]<sup>5</sup> noted, degenerative changes can occur after meniscal surgery. In this case, [appellant] had clear existing evidence at the time of his initial evaluation of preexisting arthritis. I believe his symptoms are consistent with the arthritis and that, at the most, he suffered a meniscal tear as a result of his twisting of his knees, with the meniscus already having been compromised by his preexisting arthritis.”

By report dated January 5, 1998, an Office medical consultant advised that appellant was not entitled to a greater schedule award.

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

Table 64 of the A.M.A., *Guides* indicates that in estimating appellant’s degree of impairment from a medial meniscectomy is equal to a two percent impairment of the lower extremity,<sup>6</sup> and the A.M.A., *Guides* indicates that when diagnosis-based ratings are applied it is usually not appropriate to also apply ratings for physical examination findings. In this case, while Dr. Crowe provided a conclusory statement that appellant had a 10 percent impairment of the lower extremity and provided some measurements, which could indicate that appellant was entitled to a greater award,<sup>7</sup> he indicated that he made his findings under Table 64. However, the use of Table 64 does not preclude an additional award for weakness, atrophy, pain and discomfort and Dr. Crowe indicated on an Office form report that appellant had an additional six percent impairment for these conditions.

Appellant also submitted additional medical evidence on reconsideration, which indicated a deterioration in his condition. When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Act,<sup>8</sup> to resolve the conflict in the medical opinion. In this case, appellant’s physicians, Drs. Crowe and Hanley, provided findings on examination that would indicate that he was entitled to a greater schedule award.<sup>9</sup> Although Dr. Cohen, who provided a second opinion for the Office, advised that, appellant’s current knee condition was not employment related because his knee arthritis preexisted the employment injury, Dr. Hanley indicated that, appellant’s arthritis was progressive. Further, Dr. Epps, a Board-certified

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<sup>5</sup> Dr. Epps served as an Office medical consultant to determine the need for the second surgical procedure. In an April 5, 1993 report, he advised that the surgery was indicated and was employment-related because the original surgery was not effective and the tear had extended. He concluded, “in addition, degenerative changes are known to progress after meniscectomies.”

<sup>6</sup> A.M.A., *Guides*, *supra* note 3 at 85.

<sup>7</sup> *Id.*, Table 41 at 78.

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> Both Dr. Crowe and Dr. Hanley found joint space narrowing to one inch which would entitle appellant to a 15 percent impairment under Table 62 of the A.M.A., *Guides*. Dr. Crowe also found changes in appellant’s flexion and extension which would entitle appellant to a greater award under Table 41, A.M.A., *Guides*, *supra* note 3 at 78, 83.

orthopedic surgeon who served as an Office medical consultant in 1993, advised that degenerative changes were known to progress after meniscectomies.

For these reasons, the Board finds that the conflicting views require remand for resolution.<sup>10</sup> Proceedings under the Act are not adversary in nature and the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>11</sup> On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial evaluation pursuant to section 8123(a) regarding whether appellant's current knee condition is a progression of the March 11, 1991 employment injury and, if so, the extent of the impairment of appellant's left lower extremity.<sup>12</sup> After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decisions of the Office of Workers' Compensation Programs dated January 28, 1998 and March 19, 1997 are hereby set aside and the case is remanded to the Office for proceedings consistent with this decision.

Dated, Washington, D.C.  
March 14, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> See *Joseph D. Lee*, 42 ECAB 172, 181 (1990) (remanding the case because of a conflict in the impairment ratings of appellant's physician and the Office medical adviser).

<sup>11</sup> *Claudia A. Dixon*, 47 ECAB 168 (1995).

<sup>12</sup> See 20 C.F. R. § 10.408; *Debra S. Judkins*, 41 ECAB 616 (1990).