U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of ROBERT ROMANO and U.S. POSTAL SERVICE, POST OFFICE, Asbury Park, NJ

*Docket No. 98-2207; Submitted on the Record; Issued May 11, 2000*

## DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that he is entitled to a schedule award for permanent impairment of his left lower extremity.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

On January 11, 1995 appellant, then a 42-year-old letter carrier, sustained an employment-related left knee contusion and torn meniscus. The Office of Workers' Compensation Programs authorized arthroscopic surgical repair and on May 1, 1995 appellant underwent laser chondroplasty and partial synovectomy. On February 24, 1995 he filed a claim for a schedule award and submitted medical evidence in support of his claim. In a decision dated September 6, 1996, the Office denied appellant's request for a schedule award. After an oral hearing, held at the request of appellant, an Office hearing representative affirmed the denial of a schedule award by decision dated January 29, 1988. Appellant requested reconsideration and submitted additional evidence in support of his request. In a decision dated April 13, 1998, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision.

Section 8107 of the Federal Employees' Compensation Act provides that, if there is a permanent impairment involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[1] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the*

[1] 5 U.S.C. § 8107.

*Evaluation of Permanent Impairment* as a standard for evaluating schedule losses and the Board has concurred in such adoption.[2]

The relevant medical evidence includes a November 22, 1995 report from Dr. David Weiss, an osteopathic physician, who examined and evaluated appellant pursuant to the A.M.A., *Guides*, at the request of appellant's counsel. In his report Dr. Weiss noted that appellant still suffered from residuals of his accepted injuries including left knee pain and stiffness daily which waxes and wanes, problems walking and intermittent swelling which somewhat restricted his activities of daily living. He stated that appellant's range of motion was normal, but that measurements of appellant's quadriceps revealed a .5 centimeter atrophy of the left quadriceps muscle and that muscle strength testing revealed a grade of 4 out of 5. Dr. Weiss concluded that appellant had reached maximum medical improvement on November 14, 1995 and that, pursuant to the A.M.A., *Guides*, fourth edition, appellant's muscle strength rating of 4 out of 5 equated to a 12 percent permanent impairment of the left lower extremity. In a report dated February 23, 1996, appellant's regular treating physician, Dr. Irving D. Strouse, a Board-certified orthopedic surgeon, stated that he had reviewed Dr. Weiss' report, and that Dr. Weiss' conclusions concurred with his own findings on examination. Dr. Weiss' report was reviewed by an Office medical adviser who, in a report dated April 29, 1996, advised that he utilized Table 37, page 72 of the A.M.A., *Guides* in concluding that, based on appellant's .5 centimeter left quadriceps muscle atrophy, he did not have a ratable impairment. The Office medical adviser noted that, pursuant to the comment in paragraph 3.2c, muscle atrophy (unilateral), page 76 of the A.M.A., *Guides*, manual muscle testing, upon which Dr. Weiss based his conclusion, is not as complete as atrophy measurements.[3] On reconsideration, appellant submitted a supplemental report from Dr. Weiss, dated January 16, 1998, in which the physician provided the basis for his earlier conclusions. He stated that, while he agreed that appellant did not have any impairment due to atrophy, manual muscle strength testing on examination did reveal a grade four out of five muscle strength, which, pursuant to Table 39, page 77 of the fourth edition of the A.M.A., *Guides*, corresponds to a 12 percent permanent impairment. The Office medical adviser reviewed Dr. Weiss' January 16, 1998 report and disagreed with his conclusion, stating that he did not understand the basis for Dr. Weiss' determination that a claimant with no muscle atrophy could have a muscle strength deficit of 12 percent.

[2] *James J. Hjort*, 45 ECAB 595 (1994).

[3] The Board notes that the comment in paragraph 3.2c, muscle atrophy (unilateral), page 76 of the A.M.A., *Guides* actually states that "[m]anual muscle testing gives an incomplete picture: even when results of muscle strength tests are normal, the injured extremity may fatigue more rapidly than usual. Evaluating the impairment in terms of atrophy gives an impairment estimate that more closely matches the patient's capabilities when results of manual muscle testing are normal." In this case, however, Dr. Weiss did not find appellant's manual muscle test results to be normal. Moreover, the A.M.A., *Guides* also provide, in a comment in paragraph 3.2d, manual muscle testing, that "[the impairment from weakness is judged to be of greater significance to the patient than the atrophy impairment. Thus, manual muscle testing … is the better approach to estimating the patient's impairment."

Section 8123 of the Act provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[4]

As a conflict in medical opinion exists between appellant's treating physicians, Drs. Weiss and Strouse, who opined that appellant has an employment-related permanent impairment of the left lower extremity and the Office medical adviser, who opined that appellant has no measurable employment-related permanent impairment of his left lower extremity, this case must be remanded for further development of the medical evidence. Upon remand, the Office shall refer appellant to an impartial medical specialist to resolve whether appellant has a permanent impairment of the left lower extremity due to his accepted medical conditions, pursuant to the A.M.A., *Guides*. After such further development as necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated April 13 and January 29, 1998 are hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
May 11, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[4] *Shirley L. Steib*, 46 ECAB 309 (1994).