

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GLENN METTROCK and U.S. POSTAL SERVICE,
POST OFFICE, Jersey City, NJ

*Docket No. 01-537; Submitted on the Record;
Issued July 3, 2002*

DECISION and ORDER

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

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

On August 20, 1992 appellant, then a 28-year-old building equipment mechanic, injured his right knee when he was struck with a blow hammer. The Office of Workers' Compensation Programs accepted the claim for a contusion of the right knee and authorized arthroscopic surgery to repair the tear of the medial and lateral meniscus which was performed on August 17, 1993.¹ Appellant stopped work and returned to limited-duty capacity on August 21, 1992.

Thereafter, appellant filed several Form CA-2a, notice's of recurrence of disability on August 21 and September 4, 1992. The Office accepted these recurrences as causally related to the August 20, 1992 injury.

On November 10, 1992 appellant underwent a magnetic resonance imaging (MRI) scan of the right knee which revealed a tear of the lateral and medial meniscus. On August 17, 1993 he underwent an arthroscopic debridement of the medial meniscus, right knee and synovectomy which was performed by Dr. Aldo Vitale, a Board-certified orthopedic surgeon, who diagnosed appellant with healing detachment of the anterior horn of the anterior portion of the body of the medial meniscus of the right knee and traumatic synovectomy.

On May 10, 1994 appellant filed a claim for a schedule award. He submitted reports from Dr. Vitale dated April 19 and June 3, 1994. Dr. Vitale noted moderate and intermittent loss of function due to pain and indicated that appellant had a full range of motion of the right knee. He further noted that he did not use the American Medical Association, *Guides to the Evaluation of Permanent Impairment* in determining appellant's impairment.

¹ Claim No. A02-651137.

On June 11, 1994 appellant filed a claim alleging that he injured his right knee when he was attempting to apply brakes to a piece of equipment when he felt a sharp pain.²

On June 29, 1994 appellant underwent an MRI scan of the right knee which revealed a tear of the medial meniscus. On August 29, 1994 appellant underwent an arthroscopic medial partial meniscectomy which was performed by Dr. Robert Dennis, a Board-certified orthopedic surgeon, who diagnosed appellant with posterior tear of the medial meniscectomy. The Office accepted the claim for internal derangement of the right knee³ and authorized arthroscopic surgery to repair the tear of the medial meniscus knee injury. Appellant stopped work on June 12, 1994 and returned to limited-duty capacity on July 12, 1994.

Dr. Vitale's report and the case record were referred to the Office medical adviser who, in a report dated June 27, 1994, determined that appellant sustained a two percent impairment of the left lower extremity in claim No. A02-651137.

By decision dated July 7, 1994, the Office granted appellant a schedule award for two percent impairment of the right lower extremity.

Thereafter, appellant filed several Form CA-2a, notice's of recurrence of disability, on July 20, August 13 and August 28, 1994. The Office accepted these recurrences as causally related to the June 11, 1994 injury.

In letters dated August 5, 1994 and April 12, 1995 appellant, through his attorney requested reconsideration of the decision dated July 7, 1994. Appellant submitted a March 10, 1995 medical report from Dr. David Weiss, an osteopath, who evaluated appellant for permanent impairment arising from his accepted employment injury in accordance with the A.M.A., *Guides* (fourth edition 1993). He determined that appellant sustained a 19 percent impairment: 5 percent rating for crepitation and pain on physical examination;⁴ 12 percent for right lower extremity muscle weakness -- quadriceps;⁵ and 2 percent for right medial meniscetomy.⁶

On April 15, 1995 appellant filed a claim for a schedule award claim No. A2-0682087.

Dr. Weiss' report and the case record were referred to the Office medical adviser who, in a report dated June 28, 1995, determined that appellant sustained a two percent impairment of the left lower extremity.

² Claim No. A2-0682087.

³ The record reflects that the Office doubled claim No. A02-651137 and claim No. A2-0682087; with claim No. A2-0682087 as the active case file.

⁴ See Table 62, page 83 of the A.M.A., *Guides*.

⁵ See Table 38 and 39, page 77 of the A.M.A., *Guides*.

⁶ See Table 64, page 85 of the A.M.A., *Guides*

In a decision dated July 11, 1995, the Office denied appellant's request for reconsideration on the grounds that the information submitted was insufficient to warrant modification of its prior decision.

Appellant, through his attorney, requested a hearing before an Office hearing representative.

In a letter dated March 4, 1996, the Office notified appellant that claim No. A02-651137 for the August 20, 1992 injury and claim No. A2-0682087 for the June 11, 1994 injury would no longer be considered combined for the purposes of adjudication, rather the Office determined the most appropriate way to handle the claims was separately.

In a September 3, 1996 decision, the hearing representative vacated the July 11, 1995 decision of the Office and remanded the case for further development of the medical evidence. The hearing representative specifically recommended that the Office refer appellant to a second opinion physician for a determination of the extent of permanent partial impairment of the right lower extremity as a result of the August 20, 1992 and June 11, 1994 accepted injuries.

The Office referred appellant for a second opinion to Dr. Irving Strouse, a Board-certified orthopedic surgeon, for an evaluation of the extent of any permanent impairment arising from his accepted employment injury in accordance with the A.M.A., *Guides*. He, in a report dated November 7, 1996, determined that appellant sustained a 10 percent impairment of the right lower extremity; however, he did not cite to the A.M.A., *Guides* in support of his impairment rating. The Office requested a supplemental report from Dr. Strouse requesting that he utilize the A.M.A., *Guides* in support of his impairment rating. In a report dated December 17, 1996, he noted that appellant had a full range of motion of the knee to 135 degrees; no atrophy; no sensory loss; and mild lateral joint tenderness. Dr. Strouse noted that appellant had undergone a partial medial meniscectomy and chondroplasty of the right knee. He determined that appellant had an impairment rating of two percent of the right lower extremity.⁷

Dr. Strouse's report and the case record were referred to the Office medical adviser who, in a report dated December 23, 1996, determined that appellant sustained a two percent impairment of the right lower extremity.

In a decision dated January 6, 1997, the Office determined that the medical evidence failed to support an impairment greater than two percent permanent impairment of the right lower extremity.

By letter dated January 13, 1997, appellant through his attorney requested an oral hearing before an Office hearing representative. The hearing was held on September 22, 1997. In a decision dated January 2, 1998, the hearing representative determined that Dr. Strouse's report was not in compliance with the A.M.A., *Guides*, and did not address Dr. Weiss' finding of crepitus and remanded the case and directed the Office to refer appellant to a second opinion physician to determine the degree of appellant's impairment in accordance with the A.M.A., *Guides*.

⁷ See Table 64, page 85 of the A.M.A., *Guides*.

The Office referred appellant for a second opinion⁸ to Dr. Alan Tillis, a Board-certified orthopedic surgeon, for an evaluation of the extent of any permanent impairment arising from his accepted employment injury in accordance with the A.M.A., *Guides*. Dr. Tillis, in a report dated May 15, 1998, noted physical findings of range of motion of the right knee of 150 degrees for a 0 percent impairment;⁹ 1.3 centimeter atrophy of the right thigh for a 1.5 percent whole person impairment;¹⁰ and for a partial meniscectomy a 1 percent whole person disability¹¹ for a total of 2.5 whole person impairment.

In a decision dated July 15, 1998, the Office granted appellant a seven percent permanent impairment of the left lower extremity.¹²

Appellant through his attorney requested an oral hearing before an Office hearing representative. In a decision dated January 7, 1999, the hearing representative set aside the decision dated July 15, 1998 and determined that Dr. Tillis's report did not adequately explain a finding with regard to crepitus and remanded the case and directed the Office to refer appellant back to Dr. Tillis for an opinion and determination with regard to crepitus in accordance with the A.M.A., *Guides*.¹³

On April 6, 1999 the Office referred appellant for a second opinion to Dr. Bertram M. Kummel a Board-certified orthopedic surgeon, for an evaluation of the extent of any permanent impairment arising from his accepted employment injury in accordance with the A.M.A., *Guides*. In a report dated June 8, 1999, Dr. Kummel indicated that upon physical examination he did not find crepitus or weakness in the knee. He further noted that there was no evidence of pain and indicated that range of motion was a better method to determine impairment as impairment is not rated on the basis of pain because pain is purely subjective.¹⁴ Dr. Kummel noted a loss of 10 degrees of active knee flexion; with full extension and noted an impairment rating of 5 percent of the lower extremity.¹⁵

⁸ The record reflects that the Office attempted to obtain a supplemental report from Dr. Strouse; however he was experiencing health problems so the Office referred the case to another referral physician.

⁹ See Table 41, page 78 of the A.M.A., *Guides*.

¹⁰ See Table 37, page 77 of the A.M.A., *Guides*.

¹¹ See Table 64, page 85 of the A.M.A., *Guides*.

¹² This order reflects a schedule award for the left lower extremity which is believed to be a typographical error and should be for the right lower extremity.

¹³ The Office was advised by Dr. Tillis that he would not be available to examine appellant because he was recovering from surgery. The Office referred appellant to Dr. Howard Baruch. The Office scheduled an appointment for appellant on April 15, 1999; however, appellant failed to attend the appointment. In a decision dated May 20, 1999, the Office suspended appellant's benefits for failure to attend a scheduled medical appointment. In a decision dated September 8, 1999, the Office reversed the May 20, 1999 decision and reinstated appellant's benefits noting that the Office failed to provide appellant the required 14-day period within which he could present his reasons for refusal to undergo the examination prior to suspending his benefits.

¹⁴ See page 303 of the A.M.A., *Guides*.

¹⁵ See Table 41, page 40 of the A.M.A., *Guides*.

Dr. Kummel's report and the case record were referred to the Office medical adviser who, in a report dated June 20, 1999, determined that Dr. Kummel did not adequately explain his findings in accordance with the A.M.A., *Guides*. The medical adviser noted that Dr. Kummel must indicate specific pages and tables utilized in support of his five percent impairment of the right lower extremity.

In an addendum report dated December 10, 1999, Dr. Kummel noted upon examination that appellant revealed a loss of 10 degrees of knee flexion, which results in an impairment rating of 5 percent of the lower extremity in accordance with Table 41, page 78 of the A.M.A., *Guides*.

Dr. Kummel's report and the case record were referred to the Office medical adviser who, in a report dated January 29, 2000, determined that appellant sustained a five percent impairment of the right lower extremity.

In a decision dated February 1, 2000, the Office granted appellant a seven percent permanent impairment of the left lower extremity.

Appellant through his attorney requested an oral hearing before an Office hearing representative. The hearing was held on June 28, 2000.

In a decision dated September 14, 2000, the hearing representative determined that appellant had no more than a seven percent permanent impairment of the left lower extremity as determined by Drs. Tillis and Kummel.

The Board finds that appellant has no more than a seven percent impairment of the right lower extremity.

Section 8107 of the Federal Employees' Compensation Act 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, however, does not specify the manner by which the percentage of loss of a member, function or organ shall be determined. The method used in making such a determination is a matter which rests in the sound discretion of the Office.¹⁶ For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, as the standard for determining the percentage of permanent impairment and the Board has concurred in such adoption.¹⁷

On appeal appellant alleges that there was a conflict in medical evidence between appellant's physician Dr. Weiss and the various second opinion physicians and, therefore, the case should be referred to an impartial physician for a final determination.

In a report dated March 10, 1995, Dr. Weiss found that appellant sustained a 19 percent impairment which comprised a 5 percent rating for crepitation and pain;¹⁸ a 12 percent rating for

¹⁶ *Daniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

¹⁷ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961), *Francis John Kilcoyne*, 38 ECAB 168 (1987).

¹⁸ See Table 62, page 83 of the A.M.A., *Guides*.

right lower extremity weakness;¹⁹ and a 2 percent rating for a partial right medial meniscectomy.²⁰ He determined a total impairment for the right lower extremity of 19 percent. However, Dr. Weiss improperly calculated the rating with regard to his utilization of Tables 38 and 39, on page 77 and Table 64 on page 85 of the A.M.A., *Guides*. He noted a 12 percent impairment for weakness under Table 39 and also a 2 percent impairment for a medial meniscectomy under Table 64, but these percentages would result in overlapping applications and should not be combined or added.²¹ Although appellant's physician, Dr. Weiss used the A.M.A., *Guides* to arrive at the 19 percent right lower extremity impairment rating he calculated this impairment by combining²² values from two tables which are not combinable according to the Office procedure manual.²³ The Office procedure manual addresses impairments calculated using tables with overlapping applications, leading to impairment percentages which greatly overstate the actual degree of impairment. It lists impairment tables which are incompatible and makes clear that impairment ratings from Table 38 and 39, page 77, impairments from lower extremity muscle weakness, cannot be combined with ratings for impairment estimates for lower extremity impairments, Table 64, page 85.²⁴ This was also pointed out in the FECA Bulletin 95-17, issued March 23, 1995, which discusses alternatives in calculation of an impairment for schedule award purposes. However, Dr. Weiss did exactly that, he combined impairment values for impairments from lower extremity muscle weakness with impairment values for lower extremity impairments to reach the 19 percent impairment, which is a calculation not in accordance with the Office procedure manual. Consequently, this calculation greatly overstates appellant's impairment and is therefore, of greatly diminished probative value. The only proper rating provided by Dr. Weiss which was in compliance with the A.M.A., *Guides* was his rating for crepitation and pain of 5 percent.²⁵

The Office medical adviser utilized the findings in both Drs. Tillis' and Kummel's reports to determine appellant's right lower extremity impairment. The Office medical adviser noted that Dr. Tillis reported a range of motion for the knee of 150 degrees which resulted in 0 percent impairment.²⁶ He noted atrophy of the thigh of 1.3 centimeters. The A.M.A., *Guides* provide that for 1 to 1.9 centimeters of atrophy this is an impairment range of 3 to 8 percent.²⁷ The Office medical adviser noted a 1.5 percent whole person impairment or a 5 percent

¹⁹ See Table 38 and 39, page 77 of the A.M.A., *Guides*.

²⁰ See Table 64, page 85 of the A.M.A., *Guides*

²¹ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700, Ex. 4 (October 1995).

²² See page 322.

²³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700, Exhibit 4: Use of the Fourth Edition of the A.M.A., *Guides*. (October 1995)

²⁴ *Id.*

²⁵ See Table 62, page 83 of the A.M.A., *Guides*.

²⁶ See page 78, Table 41 of the A.M.A., *Guides*.

²⁷ See page 77, Table 37 of the A.M.A., *Guides*.

impairment of the lower extremity. The medical adviser also noted Dr. Tillis' finding of partial meniscectomy which indicated a rating of two percent impairment for a total right lower extremity impairment of seven percent.²⁸ Although, Dr. Tillis did not address pain, weakness or crepitus, he properly addressed these issues in his report dated June 8, 1999. He noted that there was no evidence of weakness, crepitus or pain. Dr. Tillis determined that the impairment was not rated on the basis of pain as this was purely a subjective standard and chose to consider range of motion as the preferable method. The Office medical adviser then applied the Combined Values Chart to find appellant's impairment of the left lower extremity totaled seven percent. The Board finds that the Office medical adviser properly applied Drs. Tillis' and Kummel's findings to the A.M.A., *Guides* in calculating appellant's permanent impairment.²⁹ The Board finds that the various second opinion physicians did not present findings which would entitle appellant to an award greater than seven percent.

The Board finds that a medical conflict does not exist as Dr. Weiss did not properly apply his findings to the A.M.A., *Guides* in calculating appellant's impairment rating.³⁰ The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Drs. Tillis' and Kummel's reports and reached an impairment rating of not greater than seven percent. This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than a seven percent permanent impairment of the right lower extremity.

²⁸ See page 85, Table 64 of the A.M.A., *Guides*.

²⁹ The Office medical adviser properly found a 3 percent impairment for 1.3 centimeters of thigh atrophy as 1.3 is on the low end of the 1 to 1.9 centimeter range for mild impairment.

³⁰ See *Paul R. Evans, Jr.*, 44 ECAB 646 (1993) (an attending physician's report is of little probative value where the A.M.A., *Guides* were not properly followed); *John Constantin*, 39 ECAB 1090 (1988) (medical report not explaining how the A.M.A., *Guides* are utilized is of little probative value).

The decision of the Office of Workers' Compensation Programs dated September 14, 2000 is hereby affirmed.

Dated, Washington, DC
July 3, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member