

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD C. WARREN and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 96-2336; Submitted on the Record;
Issued August 25, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has established that he has greater than an 18 percent permanent impairment of the left lower extremity, for which he received a schedule award.

On March 28, 1990 appellant, then a 20-year-old pipefitter, filed a claim alleging that he injured his left and right knees when the wooden horse on which he was working broke. On September 12, 1990 appellant filed a claim for recurrence of disability. On September 21, 1990 the Office of Workers' Compensation Programs accepted appellant's claim for fracture of the left patella. On October 15, 1990 appellant returned to work. On October 14, 1993 appellant filed a claim for a schedule award. In a decision dated November 8, 1994, the Office granted appellant a schedule award for an 18 percent permanent impairment of the left leg for the period of January 20, 1994 to January 17, 1995 for a total of 51.84 weeks of compensation. In a decision dated June 14, 1995, an Office hearing representative rejected appellant's contention that Dr. Frank A. Mattei, a Board-certified orthopedic surgeon and impartial medical examiner, was biased but remanded the case for a new report from Dr. Mattei that was in accordance with the fourth edition of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*, and which clearly set forth the basis for his permanent impairment rating. In a decision dated October 23, 1995, the Office reinstated the schedule award for an 18 percent permanent impairment of appellant's left leg. In a merit decision dated May 2, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to establish modification.

The Board has carefully reviewed the entire case record on appeal and finds that appellant had not met his burden of proof in establishing greater than an 18 percent permanent impairment of the left lower extremity.

Section 8107 of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.³

In developing the medical evidence with respect to whether appellant had a permanent impairment related to his employment injury, the Office properly determined that there was a conflict in the medical evidence between appellant's treating physician, Dr. Nicholas P. Diamond, an osteopath and diplomat in the American Academy of Pain Management and Dr. Alexander Sapega, a Board-certified orthopedic surgeon and Office referral physician. In a report dated September 9, 1993, Dr. Diamond found a 20 percent impairment based on appellant's left patella inferior pole fracture, a 10 percent impairment based on the loss of range of motion and an 11 percent impairment based on lower leg atrophy for a total permanent impairment of 41 percent of appellant's left leg. On the other hand in a report dated January 20, 1994, Dr. Sapega found no pathology other than subjective complaints. Pursuant to section 8123(a) of the Act, appellant was referred to Dr. Mattei for an impartial medical examination and report to resolve the conflict in the medical evidence concerning the degree of impairment. In a report dated August 3, 1994, Dr. Mattei noted that appellant had beginning degenerative changes in his knees bilaterally, the range of motion in flexion and extension was equal bilaterally with no motor or sensory impairment, the consistent complaints of pain mostly involved the knee with no involvement of the neurological structures of his knee, and chondromalacia was a preexisting condition which predated the accident and may have been aggravated by the employment injury. In accordance with the third edition of the A.M.A., *Guides*, Dr. Mattei found a 10 percent permanent impairment of the left lower extremity. An Office medical adviser reviewed the reports of Drs. Sapega and Mattei and found a 7 percent impairment based on appellant's patellar recurrent subluxation, a 7 percent impairment based on appellant's post patellar fracture of the inferior pole of the left knee and a 5 percent impairment for pain for a combined impairment rating of 18 percent in accordance with the fourth edition of the A.M.A., *Guides*. After remand of the case by the Office hearing representative, Dr. Mattei provided a report dated October 5, 1995 in accordance with the fourth edition of the A.M.A., *Guides*. He provided the following findings: Section 3.2a Limb Length Discrepancy, no changes in limp for a 0 percent impairment rating; Section 3.2b Gait Derangement, Table 36, normal gait for a 0 percent impairment rating; Section 3.2c Muscle Atrophy (Unilateral), Table 37, there was a discrepancy of 1 centimeter difference between the right and left side, mild atrophy is 1 to 1.9 centimeters with a 3 to 8 percent impairment; appellant had a 3 percent impairment rating; Section 3.2d Manual Muscle

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.304.

³ *Quincy E. Malone*, 31 ECAB 846 (1980).

Testing, appellant had grade V(5) musculature throughout which would give him a reading, and under Table 39, he had no disturbance of muscle weakness in his lower extremities for a 0 impairment; Section 3.2f Joint Ankylosis, less than 5 degrees of flexion affecting both knee joints which may be due to his obesity and was a 0 impairment rating with +1 apprehension testing on left which was minimal; Section 3.2g, Table 62 Arthritis Impairments Based on Roentographically Determined Cartilage Intervals, the interval was more than 3 millimeters for a 0 impairment rating; Section 3.2i, Table 64 Impairment Estimates for Certain Lower Extremity Impairments, patellar fracture, undisplaced and healed with the highest being a 7 percent impairment. Dr. Mattei concluded there was a 10 percent total permanent impairment of the left lower extremity.

The Office initially properly reaffirmed its finding that appellant had not established more than an 18 percent permanent impairment of the left lower extremity by according this report of Dr. Mattei determinative weight. However, subsequent to the issuance of the decision, appellant requested reconsideration and submitted additional medical evidence in support of his request. In a report by Dr. Diamond dated January 26, 1996, he provided the following impairment rating calculation in accordance with the fourth edition of the A.M.A., *Guides*: a 5 percent impairment rating under Table 62 for a history of direct trauma, patellofemoral pain and crepitation; a 13 percent impairment in accordance with Table 37 for moderate lower left atrophy based on a 2.5 centimeter difference between the left leg and the right; a 7 percent impairment under Table 64 for left patellar fracture undisplaced; and a 10 percent impairment in accordance with Table 41, Knee Impairments for a mild range of motion impairment in the left knee which had a flexion extension of 0 to 100 out of 140 degrees normal. Thus, Dr. Diamond found a total permanent impairment rating of 35 percent. The Board notes, however, that Dr. Mattei was selected to resolve the conflict in medical opinions between Dr. Diamond and Dr. Sapega. For this reason, the subsequent report of Dr. Diamond which is essentially repetitive of his prior reports with respect to the range of motion, left leg atrophy and patellar fracture impairment ratings is insufficient to outweigh the special weight given the report by Dr. Mattei with respect to these issues as Dr. Diamond had participated in the creation of the medical conflict which was referred to Dr. Mattei for resolution.⁴ While the pain due to direct trauma and 5 percent impairment rating noted by Dr. Diamond in his January 1996 report was not a subject of conflict addressed by Dr. Mattei as an impartial medical examiner, this impairment rating if added to the 10 percent permanent impairment found by Dr. Mattei does not exceed the schedule award for an 18 percent impairment already awarded to appellant. Therefore, appellant has not established that the Office erred in not modifying his schedule award.

⁴ *Josephine L. Bass*, 43 ECAB 929 (1992); see *Dorothy Sidwell*, 41 ECAB 857 (1990).

The decisions of the Office of Workers' Compensation Programs dated May 2, 1996 and October 23, 1995 are hereby affirmed.

Dated, Washington, D.C.
August 25, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member