

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM G. REICHERT and DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO & FIREARMS, New York, N.Y.

*Docket No. 95-2869; Submitted on the Record;
Issued February 12, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has more than a 35 percent impairment to the right leg and a 52 percent impairment of the left leg.

In the present case, the Office of Workers' Compensation Programs accepted that appellant sustained injuries in the performance of duty on December 2, 1977, when he was involved in a motor vehicle accident. The accepted conditions include fractures of the left femur, fibula, patella, and left metatarsal, compound fracture of the right patella, and acceleration of lumbar discogenic disease. With regard to permanent impairment, the Office initially issued a schedule award for a 16 percent impairment to the right leg and 14 percent to the left leg on June 4, 1981. By decision dated May 1, 1984, an Office hearing representative vacated the schedule award and remanded the case for further development. On September 20, 1985 the Office issued a schedule award for a 25 percent permanent impairment to the right leg, a 40 percent impairment to the left leg, and a 2 percent impairment to the left finger. On June 23, 1995 the Office issued a schedule award for an additional 10 percent permanent impairment for the right leg and 12 percent for the left leg.

The Board has reviewed the record and finds that appellant has not established that he has more than a 35 percent impairment to the right leg and a 52 percent impairment to the left leg.

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability 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

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b).

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 Associations, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.²

In the present case appellant received a schedule award on September 20, 1985 for 25 percent permanent impairment of the right leg and 40 percent for the left leg, with an additional award on June 23, 1995 for 10 percent of the right leg and 12 percent of the left leg, for a total of 35 percent for the right leg and 52 percent for the left leg. As noted above, the June 4, 1991 award for 16 percent and 14 percent had been vacated. It appears that the June 23, 1995 schedule award was based on the erroneous assumption that appellant's previous award was for 16 percent of the right leg and 14 percent for the left leg.³ In any case, the Office has issued schedule awards totaling 35 percent for the right leg and 52 percent for the left leg, and the issue presented is whether appellant has a greater permanent impairment of the left and right leg than that awarded by the Office.

Appellant submitted an April 28, 1995 report from an attending physician, Dr. Robert L. Kruse, an orthopedic surgeon, who provided results on examination and discussed the degree of permanent impairment under the 4th edition of the A.M.A., *Guides*.⁴ With respect to the right leg, Dr. Kruse opined that appellant had an impairment rating of 20 percent due to arthritis in the knee, a partial patellectomy resulting in a 10 percent impairment, and range of motion impairments totaling 19 percent. Dr. Kruse combined these impairments for a 42 percent impairment to the right leg. This opinion as to the percentage of permanent impairment is of diminished probative value since, as the Office medical adviser noted in his June 6, 1995 memorandum, the A.M.A., *Guides* do not contemplate using both the range of motion method and the arthritis table together.⁵ Moreover, Dr. Kruse does not identify the tables used for range of motion impairments.⁶

Accordingly, the Board is unable to find any probative medical evidence establishing more than a 35 percent impairment to the right leg. The Office medical adviser found that appellant had a 20 percent impairment due to arthritis and identified Table 62 as the basis for this calculation, and he properly noted that a partial patellectomy resulted in a 7 percent impairment under Table 64. This represents the probative evidence of record.

² A. *George Lampo*, 45 ECAB 441 (1994).

³ By finding an additional 10 percent for the right leg and 12 percent for the left leg in the June 23, 1995 award, the total would be 26 percent for each leg, which is in accord with the opinion of an Office medical adviser in a memorandum dated June 6, 1995.

⁴ Although Dr. Kruse converted lower extremity impairments to whole body impairments, schedule awards under the Act are based on specific members of the body, not the body as a whole; see *James E. Mills*, 43 ECAB 215 (1991).

⁵ The A.M.A., *Guides* state that range of motion techniques are of limited value for estimating impairment due to arthritis, and Table 62 is provided as an alternate method of determining arthritis impairment based on roentgenographic findings. A.M.A., *Guides*, (4th ed. 1993), 82-83.

⁶ For example, Dr. Kruse stated that 90 degrees of knee flexion resulted in an 18 percent impairment, although Table 41, at page 78, indicates that 90 degrees of flexion results in a 10 percent impairment.

With respect to the left leg, Dr. Kruse indicated that appellant had a 20 percent impairment due to moderate arthritis in the left knee and a one inch leg length discrepancy. The Board notes that there are separate tables for impairments due to arthritis and limb length discrepancies, and Dr. Kruse does not further explain his calculation.⁷ He provides range of motion for the knee impairments, but as noted above range of motion represents an alternative method of calculation that is not combined with the arthritis impairment determined under Table 62. Dr. Kruse does not identify the tables used to determine range of motion impairments, either for the left knee or for the left hip.

In summary, the Office medical adviser on reviewing Dr. Kruse's report provided the only probative evidence regarding the degree of permanent impairment in the left leg. The Board therefore finds that appellant has not established that he sustained more than the 52 percent permanent impairment to the left leg previously awarded.

The decision of the Office of Workers' Compensation Programs dated June 23, 1995 is affirmed.

Dated, Washington, D.C.
February 12, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ Table 35 provides impairments for limb length discrepancy; a one inch discrepancy results in a left leg impairment of between 5 and 9 percent.