U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRY OLMO and DEPARTMENT OF THE NAVY, NAVAL MEDICAL COMMAND, Philadelphia, Pa.

Docket No. 96-924; Submitted on the Record;
Issued January 27, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS, DAVID S. GERSON

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 right lower extremity.

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

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3] Section 8107 of the 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.[4] 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 of Workers' Compensation Programs has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.[5]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107(a).

[5] *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

In the present case, the Office accepted that appellant sustained an employment-related sprain of the medial ligament of his right knee on February 27, 1989. Appellant alleged that he was entitled to a schedule award for permanent impairment of his right lower extremity and the Office referred him to Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the extent of the permanent impairment of his right lower extremity.[6] In a report dated September 20, 1993, Dr. Fabiani determined that appellant did not have a permanent impairment of his right lower extremity. By decision dated March 16, 1995, the Office denied appellant's schedule award claim on the grounds that the weight of the medical evidence rested with the opinion of Dr. Fabiani and, by decision dated and finalized November 2, 1995, an Office hearing representative denied modification of the Office's March 16, 1995 decision.

In his September 30, 1993 report, Dr. Fabiani indicated that he examined appellant on September 15, 1993 and stated:

> "Patient has no impairment regarding his knee and he has no quadricep atrophy and a complete normal range of motion and flexion and extension. There is also no sensory involvement. I find no instability or other factors that would lead to early arthritis of this knee."

Dr. Fabiani did not, however, provide actual measurements of the testing he performed and under the circumstances of the present case, the Board is unable to otherwise determine whether his conclusion regarding appellant's right lower extremity impairment was arrived at in accordance with the relevant standards of the A.M.A., *Guides*. The A.M.A., *Guides* provides certain testing procedures for evaluating lower extremity impairment and delineates particular examination findings which will warrant an impairment rating.[7] With particular regard to range of motion testing, the A.M.A., *Guides* provides that motion, such as knee flexion, of less than a certain number of degrees will warrant an impairment rating.[8] Dr. Fabiani indicated that appellant had normal range of motion of his right knee, but it is unclear, in the absence of the actual findings, whether appellant's range of motion upon examination was normal under the relevant standards of the A.M.A., *Guides.*

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental

[6] The Office determined that a conflict in the medical evidence, regarding appellant's right lower extremity impairment, was created by the June 5, 1991 report of Dr. Ronald Goldberg, an attending osteopath, and a July 9, 1992 report of Dr. Norman Eckbold, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion. Section 8123(a) of the Act provides in pertinent part: "If there is 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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[7] *See* A.M.A., *Guides* 75-87 (4th ed. 1993).

[8] *Id.* at 78.

report from the examiner for the purpose of correcting the defect in the original opinion.[9] For the reasons discussed above, the opinion of Dr. Fabiani is in need of clarification and elaboration.[10] Dr. Fabiani should explain how his evaluation was conducted in accordance with the relevant standards of the A.M.A., *Guides.*

Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded to the Office for referral of the case record, a statement of accepted facts and, if necessary, appellant, to Dr. Fabiani for a supplemental report regarding whether appellant has a permanent impairment of his right lower extremity under the relevant standards of the A.M.A., *Guides*. If Dr. Fabiani is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical examiner.[11] After such further development as the Office deems necessary, an appropriate decision should be issued regarding whether appellant is entitled to a schedule award for permanent impairment of his right lower extremity.

[9] *Nancy Lackner (Jack D. Lackner),* 40 ECAB 232, 238 (1988); *Harold Travis,* 30 ECAB 1071, 1078 (1979).

[10] Appellant alleged that he was entitled to participate in the selection of the impartial medical examiner but he did not submit sufficient evidence to allow for his participation in the selection process. Office procedure details circumstances in which a claimant may participate in the selection of an impartial medical examiner, including the situation in which there is documented bias by the selected impartial medical examiner. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(4) (March 1994). Appellant suggested that Dr. Fabiani was biased against claimants, but he did not provide any evidence to document this allegation; he requested that the Office provide certain documents, including reports of Dr. Fabiani's medical examinations from the past five years, but he did not provide sufficient justification for this request.

[11] *See Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

The decisions of the Office of Workers' Compensation Programs dated November 2 and March 16, 1995 are set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
January 27, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member