

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNESTO Y. MARTINEZ and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, Laredo, TX

*Docket No. 98-1106; Submitted on the Record;
Issued December 16, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has established that he has greater than a three percent permanent impairment for loss of use of the right leg, for which he received a schedule award.

On September 15, 1993 appellant, a 38-year-old border patrol agent, fell on his right side while in pursuit of suspected illegal aliens. He filed a claim for benefits based on injuries to his right knee and right shoulder on the date of injury, which was accepted by the Office of Workers' Compensation Programs for multiple contusions to his right knee and right shoulder by letter dated November 19, 1993.

On December 16, 1993 Dr. Michael D. LeCompte, an osteopath, performed arthroscopic surgery (meniscectomy) on appellant to repair a medial meniscus tear of the right knee.

On December 28, 1993 appellant filed a claim for recurrence of disability, alleging that he continued to suffer pain and discomfort in his right knee which was caused or aggravated by the accepted September 15, 1993 employment injury.¹ The Office accepted appellant's claim for recurrence of disability by letter dated May 19, 1994.

Appellant filed a Form CA-7, claim for a schedule award based on partial loss of use of his right lower extremity. In support of his claim, appellant submitted an April 11, 1996 report and impairment evaluation from Dr. LeCompte, who found that appellant had a 20 percent permanent disability of the right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (third edition).

In a memorandum dated June 25, 1996, an Office medical adviser, noting that Dr. LeCompte had relied on the third edition of the A.M.A., *Guides* in issuing his impairment findings, found that Dr. LeCompte's report failed to meet the applicable Office evidentiary

¹ Appellant returned to full duty with the employing establishment on March 28, 1994.

standards for a probative impairment evaluation. By letter dated July 2, 1996, the Office asked Dr. LeCompte to reevaluate appellant's impairment rating and submit a new report based on the A.M.A., *Guides* (fourth edition). Dr. LeCompte did not respond to this request.

By letter dated February 27, 1997, the Office referred appellant for a second opinion impairment evaluation with Dr. Hyman P. Roosth, a Board-certified orthopedic surgeon, on March 12, 1997, to evaluate the extent of his permanent partial impairment based on loss of use of his right lower extremity due to the September 15, 1993 employment injury.

In a report dated March 13, 1997, Dr. Roosth found that appellant had a three percent permanent disability of the right lower extremity pursuant to the A.M.A., *Guides*. Dr. Roosth stated:

“Using the A.M.A., [*Guides*], [fourth] [e]dition, Table 64, the percentage of impairment for the right lower extremity is two percent (one percent whole body). Weakness, atrophy, or limitation of motion are insufficient to warrant an impairment rating. There is no joint narrowing on x-ray to warrant impairment from arthritis. The right medial joint is wider than the left medial joint. Although there is no listing in the [A.M.A.] [*Guides*] for chondromalacia without narrowing of the joint seen on x-ray, a fair impairment rating could include a minimum amount for the operative description of treated [chondromalacia] of the joint; and also embody an assessment based on the unknown future result of partial versus total meniscectomy. The recommended additional amount is one-half (0.5) percent whole person. This would provide a total impairment rating of three percent right lower extremity [based on] (one and one-half percent whole person).

“The date of maximum medical improvement was January 15, 1995.... There is no restriction of motion for the right knee. [Appellant] has subjective complaints of pain with full flexion, and with attempted full squat.”

In a memorandum and schedule award worksheet dated April 7, 1997, the Office medical adviser found that appellant had a three percent permanent impairment based on loss of use of his right lower extremity. Relying on Dr. Roosth's findings and conclusions, the Office medical adviser accorded appellant a two percent impairment based on the partial meniscectomy, pursuant to Table 64, page 85 of the A.M.A., *Guides*, together with a diagnosis-based (chondromalacia) estimated impairment of one percent, pursuant to page 84 of the A.M.A., *Guides*.

On June 20, 1997 the Office granted appellant a schedule award for a three percent permanent impairment of the right lower extremity for the period January 15 to March 16, 1995, for a total of 8.64 weeks of compensation.

The Board finds that appellant has no more than a three percent permanent impairment for loss of use of the right lower extremity, for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, neither the Act nor its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses, and the Board has concurred in such adoption.⁵

In the instant case, the Office determined that appellant had a three percent permanent impairment of his right lower extremity by adopting the findings of the Office medical adviser, who determined the precise impairment rating by taking Dr. Roosth's calculations based on chondromalacia of the right knee, together with an impairment rating based on residuals from appellant's December 16, 1993 partial meniscectomy. The Office medical adviser then applied these findings to the applicable tables of the A.M.A., *Guides*, and added them together to arrive at the total percentage of impairment in appellant's right lower extremity based on the applicable figures and tables of the A.M.A., *Guides*.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a three percent permanent impairment for loss of use of his right lower extremity, for which he has received a schedule award from the Office, and that appellant has failed to provide probative, supportable medical evidence that he has greater than the three percent impairment already awarded.

The Board further finds that Dr. LeCompte's opinion lacked probative value, as he failed to calculate his impairment rating pursuant to the fourth edition of the A.M.A., *Guides*, under the protocols set forth above.

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.304.

⁴ 5 U.S.C. § 8107(c)(19).

⁵ *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

The decision of the Office of Workers' Compensation Programs dated June 20, 1997 is hereby affirmed.

Dated, Washington, D.C.
December 16, 1999

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member