

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSAN MASSELLE and U.S. POSTAL SERVICE,  
POST OFFICE, Hartford, Conn.

*Docket No. 96-1487; Submitted on the Record;  
Issued February 23, 1999*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant is entitled to a schedule award for a permanent impairment of the right lower extremity.

The Board has duly reviewed the case record in this appeal and finds that appellant is not entitled to a schedule award for a permanent impairment of the right lower extremity.

On March 22, 1989 appellant, then a carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 21, 1989, she injured her right knee when she tripped on a coat hanger. Appellant stopped work on April 4, 1989 and returned to work on April 15, 1989.<sup>1</sup>

The Office of Workers' Compensation Programs accepted appellant's claim for right knee sprain and tardy nerve palsy of the left ulnar nerve. The Office authorized right knee arthroscopy which was performed on June 23, 1989, left knee arthroscopy which was performed on March 1, 1990, open lateral release of the right knee which was performed on May 21, 1992 and left knee patellectomy which was performed on September 15, 1993.

On July 1, 1993 appellant filed a schedule award (Form CA-7) accompanied by medical evidence.

In a March 18, 1995 medical report, an Office medical adviser reviewed the medical evidence of record and determined that appellant had a 22 percent impairment of the left lower extremity based on Table 64, page 85 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

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<sup>1</sup> Subsequent to her return to work, appellant worked on an intermittent basis and retired from the employing establishment on disability on February 4, 1996.

By memorandum dated March 31, 1995, the Office advised the Office medical adviser to provide the date of appellant's maximum medical improvement regarding her left knee. The Office also advised the Office medical adviser to determine whether appellant had any impairment of the right lower extremity based on the fourth edition of the A.M.A., *Guides* noting that in 1992 Dr. Gordon A. Zimmermann, a Board-certified orthopedic surgeon, opined that appellant had a 15 percent impairment of the right lower extremity.

In an April 11, 1995 medical report, the Office medical adviser opined that the date of maximum medical improvement regarding appellant's left knee was September 6, 1994, the date of appellant's most recent evaluation by Dr. Zimmermann, and that appellant did not have any impairment of the right knee based on Table 41, page 78 of the fourth edition of the A.M.A., *Guides*.

By decision dated May 10, 1995, the Office found the medical evidence of record insufficient to establish that appellant was entitled to a schedule award for her right lower extremity based on the Office medical adviser's determination. By letter dated June 5, 1995, appellant, through her counsel, requested reconsideration of the Office's decision accompanied by medical evidence.<sup>2</sup>

In an August 11, 1995 medical report, an Office medical adviser indicated a review of the medical evidence of record and opined that appellant had no ratable impairment of the right knee and that the date of maximum medical improvement was September 6, 1994.

By decision dated August 15, 1995, the Office denied appellant's request for modification based on a merit review of the claim. In an October 26, 1995 letter, appellant, through her counsel, requested reconsideration of the Office's decision accompanied by medical evidence.

On December 30, 1995 an Office medical adviser indicated a review of the medical evidence of record and determined that appellant had no impairment of the right lower extremity.

By decision dated January 23, 1996, the Office denied appellant's request for modification based on a merit review of the claim.<sup>3</sup>

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<sup>2</sup> On July 5, 1995 the Office granted appellant a schedule award for a 22 percent permanent impairment of the left lower extremity for the period September 6, 1994 through November 23, 1995.

<sup>3</sup> The Board notes that subsequent to the Office's January 23, 1996 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1). Further, by letter dated April 2, 1996, the Office advised appellant to submit a medical report regarding the status of her left hand condition based on the submission of a medical report from Dr. Richard M. Linburg, a Board-certified orthopedic surgeon, to determine whether she was entitled to a schedule award. By response letter dated April 9, 1996, appellant, through her counsel, submitted medical evidence. The record, however, does not reveal a decision on this issue, therefore, the Board cannot address this issue on appeal. 20 C.F.R. § 501.2(c)(1).

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation,<sup>5</sup> 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 of loss of use.<sup>6</sup> However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>7</sup>

In the present case, the Office based its assessment of the impairment of appellant's right lower extremity on the Office medical adviser's medical reports dated April 11, August 11 and December 30, 1995. In his April 11, 1995 medical report, the Office medical adviser noted that Dr. Zimmermann's October 26, 1992 medical report revealed that appellant had a 15 percent permanent impairment of each knee at the time of his examination. The Office medical adviser stated that "[w]ith all respect to Dr. Zimmerman[n] he does not specify on what basis such an impairment for the right knee is based." The Office medical adviser further stated that Dr. Zimmermann "assigns no impairment rating for the right knee" in his September 6, 1994 medical report. The Office medical adviser then stated:

"[I]n my considered medical opinion, with reasonable medical certainty, I agree. There is no indication by any of the reports of examinations of the claimant in the record that her valgus deformity of the knees exceeds 10 degrees, the minimum necessary for an impairment rating A.M.A., *Guides*, fourth edition, page 3/78 Table 41).

"Despite the finding of chondromalacia of both knees, I do not find in the A.M.A., *Guides* an impairment rating for this condition.

"Despite the finding of crepitation of both knees (Dr. Zimmerman[n]'s letter dated September 6, 1994), while the A.M.A., *Guides* does assign an impairment rating for crepitation of joints of the upper extremities (page 3/59 Table 19), it is not considered relevant to determination of impairment in the lower extremities.... [C]repitation is an inconstant finding that depends on factors such as forces on joint surfaces and synovial fluid viscosity. (page 3/82 column 2 paragraph 2).

"Thomas J. Stevens, MD (Orthopedics) assigns date of maximum medical improvement for the right knee as November 18, 1992."

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<sup>4</sup> 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

<sup>5</sup> 20 C.F.R. § 10.304.

<sup>6</sup> 5 U.S.C. § 8107(c)(19).

<sup>7</sup> See *James J. Hjort*, 45 ECAB 595 (1994); *Luis Chapa, Jr.*, 41 ECAB 159 (1989); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

The Office medical adviser concluded that he found no impairment of the right knee, other than that secondary to the preexisting patellofemoral malalignment, which he did not believe had been substantially or permanently exacerbated by the March 1989 employment injury.

In his August 11, 1995 medical report, the Office medical adviser opined that there was no ratable schedule award applicable to appellant's right knee. The Office medical adviser stated:

"Mr. Levine [appellant's counsel] advised this office that the letter of Dr. Mara describes his examination of the claimant's right knee, and documents a valgus deformity of between 20 to 22 degrees of that knee. By my own review of Dr. Mara's report, he does not state explicitly that the increased Q angle is measured on the claimant's right knee. He describes a '...generally valgus attitude to the knees.... She does have an increased Q angle measuring approximately 20 to 22 degrees and a positive patella apprehension test bilaterally.' One may argue whether the word 'bilaterally' applies only to the positive patella apprehension test, or if it applies to the increased Q angle of both knees, as well.

"There is clearly asymmetry in the degree of subjective symptoms the claimant experiences, with the left knee being the more severe. A reasonable medical observer, in my opinion, would not automatically apply bilaterality to the Q angle measurement, unless there was additional independent confirmation of this finding by other physicians. None are to be found in the record.

"Gordon A. Zimmerman[n], MD, the claimant's treating orthopedist, in his note of October 26, 1992 describes 'valgus alignment' of both knees. In my opinion, given the nature of his report, he would have commented clearly if this exceeded the range of normal.

"By Dr. Zimmerman[n]'s report of September 6, 1994, the most recent evaluation of the claimant found in the record, he makes no comment regarding the claimant's right knee, except to comment that, subsequent to a number of surgical procedures 'the right knee responded reasonably well.' Dr. Zimmerman[n] applies an impairment rating to the left knee alone at this most recent exam[ination]. 'X-rays ... were ... found to be unrevealing.' No increased Q angle was noted. In my opinion, by this evaluation, more than three years after that of Dr. Mara above, the claimant's treating orthopedist found no reason to mention the right knee, and I would infer that there did not exist at that time either symptoms or objective findings that would support the finding of a rateable [sic] impairment. He did not assign a rating to the right knee at this time."

The Office medical adviser's December 30, 1995 medical report noted Dr. Zimmermann's October 2, 1995 medical report. The Office medical adviser stated:

“[W]ith all respect to him, Dr. Zimmerman[n] does not describe, in all the communications from him, including the most recent report, any objective functional impairment of the right knee. Further, there is no allowance in the A.M.A., *Guides*, fourth edition, Chapter 3 and especially page 3/85 Table 64 for schedule award on the basis of the surgeries the claimant has sustained on her right knee. There is no indication in his report that Dr. Zimmerman[n] has utilized the A.M.A., *Guides* incoming to his determination.”

The June 17, 1991 medical report of Dr. John J. Mara, a Board-certified orthopedic surgeon, revealed that appellant had an increased Q angle measuring approximately 20 to 22 degrees and a positive patella apprehension test bilaterally. Dr. Mara failed to provide an impairment rating for appellant’s right knee based on the A.M.A., *Guides*.

In an October 26, 1992 medical report, revealing that appellant had a 15 percent impairment of the right knee, Dr. Zimmermann failed to indicate that he applied the A.M.A., *Guides* in making this determination. Further, his September 6, 1994 medical report failed to address whether appellant had any permanent impairment of the right knee, rather it merely revealed that appellant had a 25 percent permanent impairment of the left knee. In addition, Dr. Zimmermann’s October 2, 1995 medical report failed to indicate that he applied the A.M.A., *Guides* in determining that appellant had a 15 percent permanent impairment of the right knee.

The November 9, 1992 medical report of Dr. Thomas J. Stevens, a Board-certified orthopedic surgeon, revealed that appellant had an 18 percent impairment of each knee secondary to chondromalacia. Dr. Stevens, however, failed to indicate that he applied the A.M.A., *Guides* in making this determination. His deposition provided that appellant had a preexisting right knee condition which would not have become symptomatic unless there was an injury to the knee. Dr. Stevens failed to determine whether appellant had any impairment based on the A.M.A., *Guides*.

Inasmuch as the Office medical adviser properly applied the fourth edition of the A.M.A., *Guides*, the Board finds that appellant is not entitled to a schedule award for the right lower extremity.

The August 15 and January 23, 1996, and May 10, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.  
February 23, 1999

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member