U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL W. STURDIVANT and DEPARTMENT OF THE ARMY, STURCTURAL MAINTENANCE SECTION, Fort Dix, N.J.

Docket No. 97-2281; Submitted on the Record;
Issued May 12, 1999

DECISION and ORDER

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

The issue is whether appellant has established his entitlement to a schedule award greater than the 10 percent he received for permanent impairment of his left lower extremity.

The Board has carefully reviewed the case record and finds that this case is not in posture for decision because of an unresolved conflict in the medical opinion evidence.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for the permanent impairment of specified bodily members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3]

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[4] The method used in making such determinations rests in the sound discretion of the Office of Workers' Compensation Programs.[5] For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the American Medical Association, *Guides to the Evaluation of*

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[1] 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19).

[4] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[5] *George E. Williams*, 44 ECAB 530, 532 (1993).

Permanent Impairment (A.M.A., *Guides*) as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[6]

Section 8123 of the Act[7] provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[8] In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value and its convincing quality.[9] This evaluation is based on the opportunity for, and thoroughness of, the physical examination; the accuracy and completeness of the physicians' knowledge of the facts and medical history; the care and skill of the physician's analysis and the medical rationale expressed in support of the physician's opinion.[10]

In this case, appellant's notice of traumatic injury, filed on October 23, 1991 after appellant twisted his left knee at work, was accepted for a sprained knee, and appellant underwent reconstructive surgery to repair tears in the medial meniscus and anterior and collateral ligaments.

Appellant applied for a schedule award on December 28, 1993 and submitted the report of Dr. David Weiss, an osteopathic practitioner, finding a 26 percent permanent impairment of his left lower extremity. Appellant also submitted a form report from Dr. David Bosacco, a Board-certified orthopedic surgeon, finding that appellant had retained 90/120 degrees of active flexion and Office degrees of extension and had a 26 permanent impairment of the left lower extremity.

The Office medical adviser reviewed Dr. Bosacco's report and stated that appellant had reached maximum medical improvement on August 25, 1993 that he had a 10 percent impairment of the left knee based on flexion-extension of 0-90 degrees and that FECA Bulletin 95-17 disallowed consideration of weakness, atrophy or discomfort in conjunction with Table 41, page 78, covering flexion-extension.

On June 13, 1995 the Office issued a schedule award for 10 percent impairment of appellant's left lower extremity. The $12,145.20 award ran from August 25, 1993 to March 14, 1994.

Appellant disagreed with the amount of the award and requested an oral hearing, which was held on March 19, 1996. The hearing representative affirmed the 10 percent schedule

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[6] *James J. Hjort*, 45 ECAB 595, 599 (1994).

[7] 5 U.S.C. § 8123(a).

[8] *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

[9] *Connie Johns*, 44 ECAB 560, 570 (1993).

[10] *Melvina Jackson*, 38 ECAB 443, 449 (1987).

award, according determinative weight to the rating of the Office medical adviser and noting that neither Dr. Weiss nor Dr. Bosacco applied the appropriate tables in the A.M.A., *Guides.*

Appellant requested reconsideration, and submitted a December 24, 1996 report, from Dr. Weiss, who confirmed that he had used the proper editions of the A.M.A., *Guides* in evaluating appellant's impairment.[11] The Office denied appellant's request on April 2, 1997 on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant review of the hearing representative's November 4, 1996 decision.

The Board finds that a conflict in the medical opinion evidence exists between the 10 percent impairment rating found by the Office medical adviser and the higher percentages reported by Drs. Weiss and Bosacco. In his August 29, 1993 report, Dr. Weiss examined appellant and reviewed his medical history. He provided the following ratings, based on the third edition of the A.M.A., *Guides*: medial meniscus injury, 1 percent; anterior cruciate ligament tears, 3 percent; medial collateral ligament tears, 3 percent; left knee reconstruction, 10 percent; loss of range of motion, 4 percent; and muscle atrophy, 5 percent, for a total of 26 percent.

The Office medical adviser advised on May 27, 1994 that Dr. Bosacco had reported "a rather good result" from appellant's reconstructive surgery and Dr. Weiss found a 26 percent impairment. Because of this "dichotomy," the Office medical adviser suggested that appellant be sent back to Dr. Bosacco for an updated impairment evaluation. In response to the Office's inquiry, Dr. Bosacco completed a form report, noting flexion/extension of 0-90/120, the same measurement provided by Dr. Weiss, additional impairment of function due to weakness, atrophy, or pain and concluded that appellant had a 26 percent impairment.

Subsequently, Dr. Weiss applied Table 64, page 85 of the fourth edition of the A.M.A., *Guides*, and reported a 7 percent impairment for cruciate ligament laxity, 13 percent for moderate quadriceps atrophy and 13 percent for calf atrophy, totaling 24 percent or, based on the combined values chart, a total 29 percent impairment. Thus, there is a conflict between the higher 26 or 29 percent rating found by appellant's physicians and the 10 percent impairment calculated by the Office medical adviser, applying Table 41, page 78.

While Dr. Weiss' application of the A.M.A., *Guides* may lack clarity, the Board finds that the conflicting views require remand for resolution.[12] On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial evaluation pursuant to section 8123(a) regarding the extent of the partial

[11] Office procedures direct the use of the third edition, revised of the A.M.A., *Guides*, for schedule awards determined between September 1, 1991 and October 31, 1993. Appellant's date of maximum medical improvement was August 25, 1993.

[12] *See Joseph D. Lee*, 42 ECAB 172, 181 (1990) (remanding the case because of a conflict in the impairment ratings of appellant's physician and the Office medical adviser).

impairment of appellant's left lower extremity.[13] After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The April 2, 1997 and November 4, 1996 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
May 12, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[13] *See* 20 C.F. R. § 10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).