

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MURIEL B. LOVE and DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS, Cleveland, OH

*Docket No. 98-776; Submitted on the Record;
Issued November 2, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether appellant has greater than a 26 percent permanent disability of the right lower extremity.

The Board has duly reviewed the case record in the present case and finds that appellant has no greater than a 26 percent impairment of her right lower extremity.

An employee seeking compensation under the Federal Employees' Compensation Act¹ 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* (A.M.A., *Guides*,) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁵

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 this case, the Office accepted that appellant sustained an employment-related right knee contusion on June 5, 1990 and an employment-related right knee sprain on June 12, 1991 and authorized right knee arthroscopy which was performed on February 19, 1991. By award of compensation dated May 3, 1994, the Office issued appellant a schedule award for 26 percent permanent impairment of her right lower extremity. Appellant requested reconsideration of the Office's decision, alleging that she was entitled to greater than 26 percent permanent impairment and submitted additional medical evidence in support of her request. By decision dated May 28, 1997, the Office found the evidence failed to establish that appellant has any additional impairment to her right lower extremity and thus appellant is not entitled to greater than a 26 percent permanent impairment of her right lower extremity. Appellant again requested reconsideration and by decision dated June 18, 1997, the Office denied appellant's request for further review of the merits on the grounds that appellant did not submit any new evidence and did not present legal argument not previously considered.

In support of her claim that she has more than a 26 percent permanent impairment of her right lower extremity, appellant, in a letter dated April 18, 1995, submitted reports dated January 19, June 8 and August 10, 1994 from Dr. Curtis W. Smith,⁶ an orthopedic surgeon and subsequently submitted a report dated October 20, 1994 from Dr. Mikal Rahman, a Board-certified internist. In his most recent August 10, 1994 report, which contains his most detailed findings, Dr. Smith stated that appellant had a significant decrease in the range of motion from 0 to 100 degrees, but with crepitus on range of motion in the patellofemoral joint. He added that no instability of the patella could be seen, apparent effusion remained and that ligamentous examination was stable. Dr. Smith found continuing tenderness in the periarticular surface of the patellofemoral joint but no apprehension to dislocation of the patella. He concluded that using the A.M.A., *Guides*, fourth edition, page 78, Table 41, appellant's loss of 50 degrees of motion represented an impairment between the mild and moderate category, somewhere around 15 percent, with respect to loss of motion only. In addition, he rated appellant an additional 20 percent impaired due to continued pain, crepitus and effusion, for a total of 35 percent loss of function of the right lower extremity.

In a memorandum dated September 1, 1994, an Office medical adviser noted that Dr. Smith had incorrectly applied the A.M.A., *Guides* and that when properly applied, appellant's loss of range of motion in her right knee equated to a 10 percent impairment, not 15 percent as found by Dr. Smith. The Office medical adviser further noted that Dr. Smith did not explain how he used the A.M.A., *Guides* to consider the issue of crepitus as well as chronic pain and further did not correctly combine the impairments for these conditions with the range of motion impairment. Therefore, the Office medical adviser concluded that Dr. Smith's report did not provide a basis for an increase in appellant's schedule award.

In reviewing Dr. Rahman's October 20, 1994 report, the Office medical adviser also found no basis for increasing appellant's schedule award. In his report, Dr. Rahman noted that appellant's knee had no effusion present but there was some slight medial joint line tenderness

⁶ Appellant also submitted a report dated July 19, 1995 from Dr. Smith in which the physician indicates that on June 27, 1995, appellant sustained another severe contusion to her right knee. In a letter dated October 10, 1996, however, appellant stated that she did not receive an additional knee injury on June 27, 1996.

and slight lateral instability. He added that examination revealed some palpable crepitations and that appellant was able to flex her knee to 120 degrees and extend her knee to 0. He also found that appellant's muscle strength in the leg was grade five and good. Dr. Rahman concluded that regarding her knee, appellant met some of the criteria for diagnostic estimate based on her arthroscopic surgery and internal derangement findings and that pursuant to the fourth edition of the A.M.A., *Guides*, these conditions equated to a seven percent impairment of the whole person. On an accompanying worksheet, Dr. Rahman indicated that appellant's lower extremity impairment rating was 17 percent.

In a report dated July 2, 1996, the Office medical adviser stated that Dr. Rahman's rating of a 17 percent permanent impairment of the right lower extremity was correct based upon the physician's reported findings at the time of his assessment. The Office medical adviser further stated, however, that as appellant was previously awarded a 26 percent impairment rating she is not eligible, based on Dr. Rahman's report, for any additional schedule award.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a 26 percent permanent impairment of the right lower extremity, for which she has received a schedule award and that appellant has failed to provide probative, supportive medical evidence that she has greater than the 26 percent impairment already awarded. Dr. Smith has failed to correctly apply the A.M.A., *Guides* and further failed to provide a complete explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.⁷ In addition, while appellant asserts that Dr. Rahman's rating represented a percentage in addition to her previously awarded 26 percent, this assertion is not supported by Dr. Rahman's report, which clearly rates appellant's impairment as either seven percent of the whole body, or 17 percent of the right lower extremity.

⁷ See *James Kennedy, Jr.*, *supra* note 5 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

The decisions of the Office of Workers' Compensation Programs dated June 18 and May 28, 1997 are affirmed.

Dated, Washington, D.C.
November 2, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member