

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TAUNYA ROTHMILLER and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Philadelphia, PA

*Docket No. 98-789; Submitted on the Record;
Issued January 11, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant established that she sustained more than a five percent permanent impairment of the left lower extremity for which she was granted a schedule award.

On December 12, 1989 appellant, then a 44-year-old laboratory technician, filed a notice of traumatic injury and claim for compensation alleging that she injured her left leg and lower back when she slipped and fell on ice at work on December 8, 1989. Appellant's attending physician, Dr. Walter Wren, an internist, examined appellant for suspected lumbar strain with radiculopathy. Dr. Wren referred appellant to Dr. James A. Anthony, Jr., a Board-certified orthopedic surgeon, who prescribed physical therapy and steroid injections. A magnetic resonance imaging scan of appellant's left knee showed degenerative changes, moderate to marked chondromalacia of the patella and a Baker's cyst. Nerve conduction studies were consistent with a mild radiculopathy. Appellant was off work from December 8, 1989 to January 22, 1990. The Office accepted the claim for left leg contusion. Appellant subsequently filed a claim for a recurrence of disability beginning May 12, 1990. She stopped work on May 14, 1990 and has not returned since that date.

On September 18, 1996 appellant filed a CA-7 claim for a schedule award.

Appellant submitted an August 14, 1996 report from Dr. David Weiss, who noted appellant's work injury as well as her complaints of low back pain and stiffness, radicular pain and numbness in the left leg during sleep, daily left knee pain which waxes and wanes and left knee swelling with episodes of instability. He reported physical findings including peripatellar tenderness, crepitation and patellar grating in the left knee, muscle strength at a grade of 4/5 involving the quadriceps and limited squatting to 75 percent of normal. Appellant's range of motion was reported to be flexion extension of 0 to 140/140 degrees with pain and motor strength testing revealed a grade of 5/5 involving the bilateral upper and lower extremities. The date of maximum medical improvement was listed as August 12, 1996. According to Dr. Weiss, appellant had a 12 percent impairment for quadriceps muscle weakness in the left knee. With

respect to that diagnosis, he footnoted in his report “Table 39, page 77” of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

By letter dated September 7, 1996, the Office requested that Dr. Anthony evaluate appellant for the purpose of determining a permanent impairment rating. On an Office rating (Form CA-1303) dated December 2, 1996, Dr. Anthony listed appellant’s date of maximum medical improvement as May 1996. He noted that with average range of flexion-extension being 150 degrees, appellant retained active flexion of 120 degrees and retained an extension of 0 degrees. Dr. Anthony further reported a 10 percent impairment of function due to weakness, atrophy, pain and discomfort in the left lower extremity. He concluded that appellant had a 30 percent impairment of the “left lower extremity and the lumbosacral spine.”

In a December 13, 1996 report, an Office medical adviser reviewed Dr. Anthony’s report and noted that a range of motion finding of 120 degrees equaled 0 percent impairment according to Table 41, page 78 of the A.M.A., *Guides*. He also reported that crepitation and pain due to chondromalacia equaled five percent impairment at Table 62, page 83 of the A.M.A., *Guides*. The Office medical adviser then concluded that appellant had a five percent permanent impairment rating as of the date of her maximum medical improvement on May 1, 1996.

In a decision dated December 19, 1996, the Office issued a schedule award for five percent permanent impairment of the left lower extremity. The period of the award was from May 1 to August 9, 1996.

Appellant contested the amount of the award and requested an oral hearing, which was held on July 29, 1997.

In conjunction with her hearing request, appellant submitted a copy of the August 14, 1996 report of Dr. Weiss, on the bottom of which was a statement from Dr. Anthony dated June 2, 1997, concurring with Dr. Weiss’ impairment rating of 12 percent of the left lower extremity.

In a decision dated October 10, 1997, an Office hearing representative affirmed a five percent schedule award, according determinative weight to the permanent impairment rating proffered by the Office medical adviser. The Office hearing representative noted in her decision that Dr. Weiss had failed to identify how he arrived at his 12 percent rating. She also noted that Dr. Anthony’s report was not well rationalized. Thus, the Office’s December 19, 1996 decision was affirmed.

The Board finds that the case is not in posture for a decision.

Section 8107 of the Federal Employees’ Compensation 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.¹ Neither the Act nor the regulations specify the manner in which the percentage of

¹ 5 U.S.C. § 8107(a).

impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for 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. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.²

The Board finds that a conflict in the medical opinion evidence exists between the Office medical adviser, who opined that appellant had a five percent impairment rating and Dr. Weiss, who opined that appellant had a 12 percent impairment rating.³ Although the Office hearing representative found that Dr. Weiss did not properly cite to the A.M.A., *Guides* in finding that appellant had a 12 percent impairment, the Board notes that Dr. Weiss specifically referenced in a footnote that his 12 percent impairment rating for muscle weakness in the left knee was based on the fourth edition of the A.M.A., *Guides*, Table 39, page 77. The Board finds that the conflicting ratings obtained by the Office medical adviser and appellant's treating physician who each used different tables and criteria require remand for resolution.⁴ On remand, the Office should refer appellant, along with a copy of the case record and a statement of accepted facts, to an appropriate medical specialist for an impartial evaluation pursuant to section 8123(a). The impartial medical specialist should be directed to evaluate appellant with respect to the extent of permanent impairment in the left lower extremity. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

² *James Kennedy, Jr.*, 40 ECAB 620 (1989); *Quincy E. Malone*, 31 ECAB 846 (1980).

³ Section 8123(a) of the Act provides that, "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).

⁴ *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).

The decision of the Office of Workers' Compensation Programs dated October 10, 1997 is hereby set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.
January 11, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member