

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BENITO F. AREGO and U.S. POSTAL SERVICE,  
POST OFFICE, Tyler, TX

*Docket No. 98-1399; Submitted on the Record;  
Issued January 13, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether appellant has established that he has greater than a 47 percent permanent impairment for loss of use of his left lower extremity, for which he received a schedule award.

Appellant, a 46-year-old letter carrier, sustained two injuries to his left ankle in December 1990. On December 4, 1990 he injured his left ankle while crossing a street. On December 11, 1990 appellant injured his left ankle when he tripped and fell to the ground while stepping from a curb. He filed a claim for benefits on the dates both injuries occurred.<sup>1</sup> The Office accepted his claim for a left ankle sprain by letter dated January 14, 1991.

Appellant underwent surgery on his left ankle on May 6, 1991 and subsequently returned to full duty with the employing establishment. Following his ankle surgery, appellant began to experience pain in his left knee which he attributed to his employment injuries. He missed work intermittently and the Office paid him compensation for appropriate periods.

In a report dated February 13, 1992, Dr. David W. Duffner, a Board-certified orthopedic surgeon and appellant's treating physician, noted appellant's complaints of continuing pain in his left knee, aggravated by activity and diagnosed left knee arthrosis and instability. The Office expanded appellant's claim to include left knee sprain, with chronic instability.

On August 26, 1991 appellant filed a Form CA-7 claim for a schedule award based on loss of use of his left lower extremity.

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<sup>1</sup> Appellant also sustained an employment injury to his left knee on June 18, 1984, which the Office of Workers' Compensation Programs accepted for left knee contusion and another injury to his left ankle on December 7, 1989. The Office combined all four of these claims into one claim.

On February 14, 1992 the Office granted appellant a schedule award for a 38 percent permanent impairment of the left leg for the period November 13, 1991 to December 18, 1993, for a total of 109.44 weeks of compensation.

In a report dated September 20, 1994, Dr. Duffner noted appellant's complaints of pain and instability in the left knee and scheduled him for anterior cruciate ligament surgery, which he performed on October 3, 1994.

Appellant subsequently returned to work with the employing establishment, accepting a limited-duty assignment for four hours per day on November 29, 1994. He received a disability retirement from the employing establishment, effective May 1, 1995.

On June 2, 1995 appellant filed a Form CA-7 claim for benefits, seeking an additional award under the schedule for loss of use of his left lower extremity greater than that which he had already been awarded. In support of his claim, appellant attached a June 13, 1995 report from Dr. Duffner which indicated that he sustained a 51 percent permanent impairment of the left lower extremity based on the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (third edition).

By letters dated November 1, 1995, the Office referred appellant for a second opinion examination with Dr. Edwin C. Simonton, a Board-certified orthopedic surgeon.

Dr. Simonton examined appellant on November 15, 1995 and evaluated him for an impairment rating. In a report issued the date of the examination, he found that appellant had a 47 percent permanent disability of the left lower extremity pursuant to the A.M.A., *Guides*. Dr. Simonton calculated this total based on: laxity of the anterior cruciate, which translated to a left lower extremity impairment of 25 percent pursuant to Table 64, page 85 of the A.M.A., *Guides*; atrophy of the left thigh and left leg, which translated to a left lower extremity impairment of 13 percent for each element pursuant to Table 64, page 85 of the A.M.A., *Guides*; and a medial meniscectomy, which translated to a left lower extremity impairment of 7 percent pursuant to Table 64, page 85 of the A.M.A., *Guides*. He then combined the atrophy totals pursuant to the Combined Values Chart, which amounted to a total impairment percentage of 24. Dr. Simonton then added the 7 percent impairment resulting from the medial meniscectomy, which amounted to a total impairment percentage of 29, together with the 25 percent impairment from the laxity of the anterior cruciate, which amounted to a 46 percent impairment of the left lower extremity.

In an Office memorandum and schedule award worksheet dated April 6, 1996, an Office medical adviser found based on Dr. Simonton's report that appellant had a 47 percent impairment of the left lower extremity.

On May 6, 1996 the Office granted appellant an additional 9 percent impairment, amounting to a schedule award for a 47 percent permanent impairment of the left lower extremity for the period November 15, 1995 to May 14, 1996, for a total of 25.92 weeks of compensation.

In a letter received by the Office on August 20, 1996, appellant requested reconsideration. In support of his request, appellant submitted reports dated June 14 and July 18, 1996 from Dr. Duffner. In his June 14, 1996 report, Dr. Duffner stated that appellant was experiencing arthritic-type knee symptoms and that he expected him to eventually develop full-blown degenerative arthritis which could require surgery. Dr. Duffner reiterated these findings in his July 18, 1996 report and found that the chondromalacia in his left knee amounted to a 25 percent additional impairment pursuant to the fourth edition of the A.M.A., *Guides*.

By decision dated March 17, 1997, the Office denied appellant's request for reconsideration, finding that appellant failed to submit medical evidence sufficient to warrant modification of its May 6, 1996 schedule award.

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

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</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 loss of use.<sup>4</sup> 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 insure 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* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>5</sup>

In the present case, the Office in its May 6, 1996 decision granted a 9 percent increase in appellant's schedule award, amounting to a total award based on a 47 percent permanent impairment. This decision was proper, as the Office relied on the impairment rating of Dr. Simonton, which represented the weight of the medical evidence at the time of the May 6, 1996 decision. Subsequent to the May 6, 1996 decision, however, appellant was reevaluated by Dr. Duffner who found that, in addition to the impairment findings issued by Dr. Simonton, appellant now had an additional 25 percent impairment based on arthritis in his left knee.<sup>6</sup> The Office ignored this finding in its May 17, 1997 decision, despite the fact that Dr. Duffner's July 18, 1996 report presented probative medical evidence that appellant's total impairment/disability may have increased since the issuance of its award. The Office therefore erred in failing to refer Dr. Duffner's report to an Office medical adviser to evaluate whether the 25 percent additional impairment he accorded to a degenerative arthritic condition was a

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

<sup>3</sup> 20 C.F.R. § 10.304.

<sup>4</sup> 5 U.S.C. § 8107(c)(19).

<sup>5</sup> *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

<sup>6</sup> Aside from the impairment rating based on arthritis, Dr. Duffner's findings were substantially similar to those rendered by Dr. Simonton in his November 15, 1995 report.

sufficient basis on which to increase appellant's total award for loss of use of his left lower extremity.

Accordingly, the case must be remanded so that the Office may reconsider Dr. Duffner's July 18, 1996 medical report and impairment evaluation to determine whether the 25 percent impairment he calculated for an arthritic condition resulted in an impairment of the left lower extremity greater than the 47 percent awarded by the Office in its May 6, 1996 decision. After such further development of the medical evidence as the Office deems necessary, the Office shall issue a *de novo* decision.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 17, 1997 is hereby set aside and remanded for further action consistent with this decision.

Dated, Washington, D.C.  
January 13, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member