

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL VINING (claiming as administrator of the estate of KEVIN M. VINING) and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 98-790; Submitted on the Record;  
Issued July 19, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for a posthumous schedule award under 5 U.S.C. § 8107 of the Federal Employees' Compensation Act.

On April 16, 1986 the employee, then a 32-year-old electrician, filed a notice of traumatic injury and claim for compensation, alleging that he twisted his left knee in the performance of duty. The Office accepted the claim for a left knee sprain. The employee was treated for his work injury by Dr. James D'Amore, a Board-certified orthopedist, and Dr. Carl Mogil, a Board-certified orthopedic surgeon. He underwent a partial medial meniscectomy on July 9, 1986. The employee received a schedule award for a 15 percent permanent impairment of his left knee. He also received compensation for intermittent periods of wage loss.

On August 10, 1993 the employee filed a (Form CA-2a) claim alleging that he sustained a recurrence of disability on that date. He never returned to work.

An Office medical adviser reviewed a magnetic resonance imaging (MRI) report dated May 17, 1993 that showed an extension of the tear in the employee's left knee from the site of the April 16, 1986 employment injury. He opined that the tearing would not have occurred, but for the accepted employment injury, although he considered the condition to be correctable. The Office subsequently approved the employee's claim for recurrence of disability and placed the employee on the periodic rolls.

In a report dated March 17, 1994, Dr. Mogil noted that the employee had active range of motion of the left knee of 0 to approximately 110 degrees, medial collateral ligamentous laxity on valgus stressing and negative drawer sign. Dr. Mogil also reviewed the May 17, 1993 MRI report and opined that the employee had recurrent internal derangement left knee, possible cruciate insufficiency. He recommended that the employee undergo "arthroscopic surgery for

correction of internal derangement and possible reconstructive surgery of osteotomy and/or cruciate ligament reconstruction.” Dr. Mogil concluded that a decision would be made to repair the anterior cruciate at the time of surgery.

The employee underwent arthroscopic surgery of the left knee to repair his torn posterior horn medial meniscus on March 31, 1995. The surgical report included a diagnosis of osteoarthritis and noted that the anterior cruciate ligament was intact.

In a treatment note dated April 18, 1995, Dr. Mogil advised that he planned to wait six months for further conditioning of the employee’s knee before he would consider performing an osteotomy. The Office gave its approval for an osteotomy effective September 1995.

In a report dated September 8, 1995, Dr. D’Amore advised that the employee remained disabled as a result of his knee injury and would possibly require further surgery. He noted that the employee continued to have pain, swelling and discomfort of the left knee for which he prescribed cortisone injections, physiotherapy and medication.

The record indicates that the employee died on July 28, 1996 and that his widow (appellant)<sup>1</sup> requested a posthumous schedule award by letter dated October 10, 1996.

In support of her claim, appellant submitted a report dated September 25, 1996 by Dr. D’Amore who stated that the employee never reached maximum medical improvement status due to the long-standing permanent damages of the left knee. He also indicated that the employee began to complain of right knee pain since the employee could not place weight on his left knee and was forced to bear all of his weight on the right knee. According to Dr. D’Amore, at the time of the employee’s last physical examination, the employee was unable to flex his left knee more than 60 to 70 degrees. He further noted that the employee experienced decreased strength with atrophic changes of the left quadriceps musculature. Dr. D’Amore opined that the employee sustained “permanent damage with approximate 60 to 70 percent loss of function of the right knee.”

In a decision dated November 25, 1996, the Office denied appellant’s request for a posthumous schedule award on the grounds that the evidence was insufficient to establish that the employee reached maximum medical improvement prior to his death on July 28, 1996.

Appellant requested a hearing, before an Office hearing representative, which was held on July 29, 1997.

At the hearing, appellant submitted a June 10, 1997 report from Dr. D’Amore in which he clarified his opinion, stating that the employee reached maximum medical improvement or maximum level of recovery as of his last examination of August 18, 1995. He noted that no one will ever know what level of recovery the employee might have reached if the Office had not deferred the diagnosis/recommendations of Dr. Mogil.

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<sup>1</sup> The employee’s son, Michael, was actually authorized to administer the employee’s estate although the employee’s widow pursued the schedule award claim before the Office.

In a decision dated October 10, 1997 and finalized on October 14, 1997, the Office hearing representative affirmed the Office's November 25, 1996 decision.

Pursuant to 5 U.S.C. § 8109 of the Act, appellant, as the widow of the deceased employee, filed a request for a schedule award for permanent partial impairment resulting from the accepted left leg injury. The Office found that, since maximum medical improvement had not been reached at the time of the employee's death, any schedule award would have to be based on conjecture. Because the Office found that the precise extent of the permanent residuals due to the employee's April 16, 1986 employment injury could not be determined, compensation was therefore denied.

The Board finds that the Office improperly denied appellant's claim for a posthumous schedule award under 5 U.S.C. § 8107 of the Act.

A disabled employee has the right to compensation for periods of temporary total or partial disability until the maximum improvement is reached; upon reaching maximum improvement, the evidence ordinarily permits a determination to be made as to the precise degree of permanent loss of use of the schedule member of the body. The Board has held that in cases involving posthumous schedule awards, precision often cannot be obtained. Nevertheless, in those situations, schedule awards have been made in other jurisdictions where the evidence shows the extent of the permanent impairment. Evidence based on conjecture, of course, would not meet the required standard of proof. However, where a physician, with a reasonable degree of medical certainty, is able to render an opinion as to the permanent loss of use of the injured member, such evidence should be given credence. Although in a particular case there may be a conflict as to the extent of the impairment, this would present a question of fact which, as in any other case, would be resolved by weighing the evidence.<sup>2</sup>

In the instant case, the Board finds that the Office erred in rejecting Dr. D'Amore's opinion on the grounds that the employee had not reached maximum medical improvement prior to his death. The Board finds that, while the employee may not have been at his optimum with respect to his leg condition, when he died he was in the later months of his estimated recovery time from his last left leg surgery, and did not have any plans for future surgery. Since Dr. D'Amore noted physical findings at the time of his last examination of the employee on August 18, 1995, the Office erred by not referring the claim to an Office medical adviser for calculation of the employee's permanent impairment in the left lower extremity in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). Although Dr. D'Amore opined that the employee had a 60 to 70 percent permanent impairment, he did not discuss his rating in terms of the A.M.A., *Guides* and his opinion is, therefore, insufficient on its own to establish appellant's claim to a schedule award. If the Office medical adviser determines that there is evidence based on the physical findings of record that the employee sustained greater than a 15 percent permanent impairment to his left lower extremity, a posthumous schedule award should be issued.

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<sup>2</sup> *Mary F. York (Ransom E. York)*, 15 ECAB 383 (1964).

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 10, 1997 and finalized on October 14, 1997 is hereby set aside and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, D.C.  
July 19, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member