

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD SALDIBAR and U.S. POSTAL SERVICE,
POST OFFICE, Staten Island, NY

*Docket No. 98-2057; Submitted on the Record;
Issued July 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to a schedule award under 5 U.S.C. § 8107; (2) whether the Office properly determined that an overpayment of \$7,192.80 was created due to payment of a prior schedule award; and (3) whether the Office properly denied waiver of the overpayment.

In the present case, the Office accepted that appellant sustained chondromalacia of the right patella in the performance of duty on March 7, 1977. By decision dated April 26, 1996, the Office determined that appellant was not entitled to a schedule award because his continuing need for physical therapy established that he had not reached maximum medical improvement. In a decision dated July 11, 1996, an Office hearing representative vacated the prior decision and remanded the case for further development of the evidence. Without any further development, the Office issued a schedule award decision on December 3, 1996 for a five percent permanent impairment to the right leg.

By decision dated October 4, 1997, an Office hearing representative vacated the schedule award decision, noting that the Office failed to follow the prior hearing representative's decision and develop the evidence. The case was remanded for further development of the medical evidence. The Office then referred appellant to Dr. Hassan Zekavat, an orthopedic surgeon, for evaluation. By decision dated February 12, 1998, the Office determined that appellant was not entitled to a schedule award based on the medical evidence of record. On February 13, 1998 the Office issued a preliminary determination that an overpayment of compensation of \$7,192.80 had been created because the original schedule award had been issued prematurely. The Office determined that appellant was not at fault in creating the overpayment. By decision dated May 15, 1998, the Office finalized its preliminary determination as to the amount of the overpayment, and found that appellant was not entitled to waiver of the overpayment.

The Board has reviewed the record and finds that the issue of entitlement to a schedule award has not been properly resolved, and therefore the case is not in posture for decision on the issues presented.

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 impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.²

In the present case, the Office has determined that appellant was not entitled to a schedule award for permanent impairment to the right leg, and therefore the December 3, 1996 schedule award represents an overpayment.³ The Board finds, however, that the issue of a schedule award to the right leg was not properly resolved. In a report dated January 30, 1998, Dr. Zekavat, the second opinion physician, indicated that, under Table 41 of the A.M.A., *Guides*,⁴ he would rate appellant's impairment as mild, from 4 to 10 percent, due to chondromalacia of the right patella. Dr. Zekavat also reported that flexion and extension of the knee was normal. In a report dated February 11, 1998, an Office medical adviser reported that "via telephone ... Dr. Zekavat indicates flexion 0 to 135 degrees." The medical adviser indicated that under Table 41 this range of motion would result in no ratable impairment.

The Board finds that the range of motion results on which the Office relied constituted an oral report. It is well established that any medical report on which the Office relies to resolve an issue must be in writing. In *Walter A. Fundinger, Jr.*,⁵ an Office medical adviser contacted a second opinion physician by telephone and the physician dictated hearing loss examination results to the medical adviser over the telephone. The Board found that this medical information could not be reviewed because it was secured by telephonic communication and was not a written report. In the present case, the range of motion results were also secured by telephonic communication. The range of motion in the right knee is necessary to resolve the issue in this case, since proper application of Table 41 requires specific flexion measurements.

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.304(b) (1998).

² A. *George Lampo*, 45 ECAB 441 (1994).

³ The preliminary determination and final overpayment decision refer to appellant not having reached maximum medical improvement and therefore the original schedule award was premature. The issue was whether appellant currently was entitled to a schedule award, and the basis for the February 12, 1998 decision was not maximum medical improvement, but that the impairment was not ratable.

⁴ A.M.A., *Guides*, 78, Table 41 (4th ed. 1993).

⁵ 37 ECAB 200, 204 (1985).

Accordingly, the case will be remanded to the Office for a supplemental written report from Dr. Zekavat regarding the relevant issues presented. After such further development, the Office should issue an appropriate decision regarding appellant's entitlement to a schedule award. Once a schedule award determination has been made, the Office should then consider the overpayment issue, if appropriate.

The decisions of the Office of Workers' Compensation Programs dated May 15 and February 12, 1998 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.

July 13, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member