U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK E. DOWNING and U.S. POSTAL SERVICE,
POST OFFICE, Provo, UT

Docket No. 99-72; Submitted on the Record;
Issued June 9, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a two percent permanent impairment of his right lower extremity for which he received a schedule award.

The Board has duly reviewed the case record and finds that this case is not in posture for decision.

An employee seeking compensation under the Federal Employees' Compensation Act[1] 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*, 4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.[5]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel 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 on November 4, 1995 appellant, then a 41-year-old letter carrier, sustained an employment-related torn right medial meniscus. The Office authorized right knee arthroscopy which was performed on November 23, 1994. By award of compensation dated May 31, 1995, the Office awarded appellant a schedule award for two percent permanent impairment of his right lower extremity. Appellant requested an oral hearing and submitted additional medical evidence. In a decision dated November 20, 1995, an Office hearing representative set aside the decision and remanded the case to the Office for further development. In a decision dated December 15, 1995, the Office awarded appellant a schedule award for two percent permanent impairment of his right lower extremity. On December 20, 1995 it came to the Office's attention that the December 15, 1995 decision contained an error in the number of weeks of compensation awarded to appellant. The error was corrected in a reissued decision dated December 20, 1995. On December 27, 1995 appellant requested an oral hearing and submitted additional medical evidence. In a decision dated February 18, 1998, an Office hearing representative affirmed the Office's prior decision awarding appellant a schedule award for two percent permanent impairment of his right lower extremity. Appellant requested reconsideration of the Office' decision, alleging that he was entitled to greater than two percent permanent impairment and submitted additional evidence and arguments in support of his request. By decision dated June 25, 1998, the Office found the evidence and arguments failed to establish that appellant has any additional impairment to his right lower extremity and thus appellant is not entitled to greater than a two percent permanent impairment of his right lower extremity.

In support of his claim that he has more than a two percent permanent impairment of his right lower extremity, appellant submitted reports dated November 23, 1994, March 30 and June 26, 1995 and May 22, 1997 from Dr. Brent M. Pratley, a treating orthopedic surgeon, and subsequently submitted a report dated March 31, 1997 from Dr. Douglas Schow, Jr., a Board-certified orthopedic surgeon, from whom appellant sought a second opinion. In his report dated November 23, 1994, which contains his operative notes, Dr. Pratley noted that arthroscopic surgery revealed that appellant's right medial meniscus had a "bucket handle tear but it only extended to the mid portion, but significant," which was excised. In an orthopedic evaluation dated March 30, 1995, he noted that appellant was 16 weeks post surgery and his condition was permanent and stationary. The physician concluded that, pursuant to the fourth edition of the A.M.A., *Guides*, Table 64, a partial to total medial meniscectomy equated to a three percent disability of the whole person.

In a memorandum dated May 10, 1995, an Office medical adviser, having reviewed Dr. Pratley's reports at the Office's request, stated that a partial medial menisectomey equated to a two percent permanent impairment of the right lower extremity.

In a supplemental report dated June 26, 1995, Dr. Pratley noted that the A.M.A., *Guides* provide for a two percent rating for a partial meniscectomy and a seven percent rating for a total meniscectomy. He explained that, as appellant had a significant meniscal excision, but still had some rim left, Dr. Pratley felt appellant's condition fell between a partial and total meniscectomy and, therefore, felt appellant had a five percent permanent impairment of the right lower extremity.

In a report dated December 12, 1995, the Office medical adviser explained that a "partial" meniscectomy, by definition, means "other than total," and that as Dr. Pratley's surgical notes clearly described a partial menisectomy, appellant's condition equated to a two percent permanent impairment pursuant to the A.M.A., *Guides*, 4th edition, Table 64, p. 3/85.

In his final report dated May 22, 1997, Dr. Pratley disputed the Office medical adviser's conclusion, stating that a bucket handle tear encompasses almost the entire meniscus and that while technically, by orthopedic definition, the excision was only partial as the rim of the meniscus was not removed, it was, in effect, a total menisectomy. He offered to redictate his operative notes to reflect that appellant had undergone a total menisectomy.

In a report dated March 31, 1997, Dr. Schow, whose second opinion was sought by appellant, stated that appellant had undergone a partial menisectomy, but that as the tear was significant, but not total, he felt appellant's condition equated to a five percent permanent impairment, a rating between partial and total.

In a final report dated June 2, 1998, the Office medical adviser again stated that the A.M.A., *Guides* did not provide for a range of conditions between a partial and total meniscectomy and that a two percent permanent impairment rating remained appropriate for appellant.

Section 8123 of the Act provides that if there is a 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.[6]

The Board finds that there is a conflict in medical opinion between appellant's treating physicians and the Office medical examiner. Drs. Pratley and Schow each opined that due to the nature and extent of appellant's meniscal tear, a "bucket handle" tear which encompassed almost the entire meniscus, appellant's condition was appropriately rated as causing a five percent permanent disability of the right lower extremity, a rating between the total and partial ratings provided in the A.M.A., *Guides*. The Office medical adviser opined that as appellant's meniscectomy was technically partial, appellant was only entitled to a two percent schedule award, as explicitly delineated in the A.M.A., *Guides*, Table 64, page 3/85. Appellant correctly asserts, however, that the A.M.A., *Guides* also provide that "an impairment value that falls between those appearing in a table or figure of the A.M.A., *Guides* may be adjusted or interpolated to be proportional to the interval of the table of figure involved, unless the book gives other directions."[7] As the A.M.A., *Guides* appear to allow interpolation or adjustment of table values, where appropriate and as appellant's physicians have explained their reasoning for choosing a value between the percentages provided for total and partial meniscectomy, this case must be remanded for further development of the medical evidence. Upon remand, the Office shall refer appellant to an impartial medical specialist to resolve whether appellant has more than

[6] *Shirley L. Steib*, 46 ECAB 309 (1994).

[7] A.M.A., *Guides*, Chapter 2.2, Rules for Evaluations: Interpolating, Measuring and Rounding Off, pg. 9.

a two percent permanent impairment of his right lower extremity, pursuant to the A.M.A., *Guides*. After such further development as necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated June 25 and February 18, 1998 are hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
June 9, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member