

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SUSANA SANCHEZ and DEPARTMENT OF JUSTICE,  
FEDERAL PRISON SYSTEMS, Anthony, NM

*Docket No. 99-64; Submitted on the Record;  
Issued May 22, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant has greater than a 10 percent permanent impairment of her right lower extremity, for which has she received a schedule award.

The Office of Workers' Compensation Programs accepted that on May 30, 1992 appellant, then a 38-year-old clerk, slipped on some water while walking to answer the telephone and sustained a right knee strain and chondromalacia patella.

On July 22, 1993 appellant was granted a schedule award for a seven percent permanent impairment of her right lower extremity for the period April 16 to September 4, 1993 for a total of 20.16 weeks of compensation. Thereafter, she underwent a right knee arthroscopy on January 10, 1997 for internal derangement of the right knee. Grade I to II chondromalacia of the patellar undersurface and femoral trochlea was noted.

A second opinion examiner, Dr. Richard S. Westbrook, a Board-certified orthopedic surgeon, opined by report dated May 27, 1997, that appellant had minimal effusion and a positive patella inhibition test on the right, with pain at the medial pole of the patella and at the inferior aspect of the lateral release area. He also noted that appellant had atrophy of the vastus medialis and vastus medialis obliquus on the right.

A second right knee arthroscopy was performed on June 13, 1997.

On February 6, 1998 appellant requested an additional schedule award.

By letter dated February 26, 1998, the Office requested that Dr. Gerald A. Halaby, appellant's treating physician and a Board-certified orthopedic surgeon, provide an opinion as to the function of appellant's right lower extremity and as to any permanent impairment. Enclosed with the request were copies of several of the most commonly used Tables regarding the lower

extremity from the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.<sup>1</sup>

By report dated March 2, 1998, Dr. Halaby noted that appellant had reached maximum medical improvement as of that date, but that she continued to have difficulty climbing stairs. Dr. Halaby noted that appellant's right thigh demonstrated two and one half centimeters atrophy and that her right calf demonstrated one half centimeter atrophy. He reported that appellant had narrowing of the patellofemoral joint with cartilage interval of three millimeters of cartilage space on the left and two millimeters of cartilage space on the right and that she did not manifest muscle weakness due to neurologic deficit but rather due to discomfort. No losses in range of motion were noted. Dr. Halaby opined that appellant had a three and one half percent whole body impairment due to atrophy, which he rounded up to a four percent whole body impairment and a four percent whole body impairment due to cartilage joint space narrowing, which, when combined, resulted in an eight percent whole body impairment.

On April 2, 1998 the Office referred Dr. Halaby's report to an Office medical adviser for his evaluation and opinion as to the nature and extent of appellant's employment-related permanent impairment.

By report dated April 7, 1998, the Office medical adviser noted that the date of appellant's maximum medical improvement was March 2, 1998 and opined that appellant had a 10 percent permanent impairment of the right lower extremity due to a interval of 2 millimeters. The Office medical adviser cited to Table 62, p. 83 of the A.M.A., *Guides* for impairment due to loss of cartilage interval, noted that Table 37, p. 77 was applicable for impairment due to thigh atrophy, but noted that FECA Bulletin 95-17 did not allow the concomitant application of Tables 37 and 62 combining impairments for both arthritis and atrophy, as that constituted duplication.

On April 16, 1998 the Office granted appellant a schedule award for an additional three percent permanent impairment of the right lower extremity for the period March 2 to May 1, 1998 for a total of 8.64 weeks of additional compensation.

By letter dated April 24, 1998, appellant requested reconsideration of her additional schedule award based upon Dr. Halaby's March 2, 1998 report. Appellant alleged that Dr. Halaby's whole body impairment ratings, when converted to right lower extremity ratings, equaled a 13 percent impairment due to atrophy using Table 37, p. 77 and a 10 percent impairment due to cartilage space loss using Table 62, which equaled a 23 percent total permanent impairment of her right lower extremity.

In support of her request appellant submitted a June 11, 1998 medical progress note from Dr. Halaby, which indicated that she noted "particular discomfort in running and [in] climbing and descending stairs." No further impairment rating was provided.

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<sup>1</sup> A.M.A., *Guides*, fourth edition (1993).

By decision dated July 10, 1998, the Office rejected appellant's request for a further review of the case on its merits, finding that the evidence submitted was cumulative in nature and insufficient to warrant a further merit review.

By letter dated August 3, 1998, appellant again requested reconsideration and in support she submitted a July 20, 1998 report from Dr. Halaby, who reexpressed his impairment rating in terms of a right lower extremity impairment, noting:

“[Appellant] has narrowing of the patellofemoral joint manifested on patellofemoral joint view. She has 3 mm. on the normal side and 2 mm. on the affected side causing 10 percent impairment to the joint, according to Table 62.

“According to Table 77, page 37, [appellant's] atrophy causes an 11 percent impairment to the lower extremity.

“Using the Combining [sic] Values Table [sic] and combining the 10 percent due the midjoint space narrowing with 11 percent due to atrophy, [appellant] would retain 20 percent permanent impairment to the lower extremity.”

By decision dated August 27, 1998, the Office denied modification of the prior April 16, 1998 decision, finding that the evidence submitted in support of the request was insufficient to warrant modification. The Office found that Dr. Halaby incorrectly combined ratings from two incompatible tables in determining appellant's total permanent impairment.

The Board finds that this 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 a member is to be determined. For consistent results and to ensure 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* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>5</sup>

Although the standards for evaluating the permanent impairment of an extremity under the A.M.A., *Guides* are based primarily on loss of range of motion, all factors that prevent a limb from functioning normally, including pain and loss of strength should be considered together

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*; *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> *James J. Hjort*, 45 ECAB 595 (1994); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

with loss of motion in evaluating the degree of permanent impairment.<sup>6</sup> Chapter 3.2 of the A.M.A., *Guides* provides a grading scheme and procedure for determining impairment of the lower extremity due to limb length discrepancy, gait derangement, muscle atrophy, loss of strength, range of motion, joint ankylosis, arthritis and peripheral nerve injury.<sup>7</sup> Impairments due to atrophy and arthritis are rated using Tables 37 and 62, respectively.

FECA Bulletin No. 95-17, issued March 23, 1995, noted that, under the A.M.A., *Guides*, impairment was sometimes calculated using tables with overlapping applications, which led to impairment percentages, which greatly overstated the actual degree of impairment. The bulletin then identified impairment tables, which were incompatible for this reason. Table 62, Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals, page 83 was noted to be incompatible with Tables 36 to 39, pp. 76-77, in determining and calculating a claimant's impairment. This bulletin was incorporated into the Office's Procedure Manual at Chapter 3.700.<sup>8</sup> Therefore, this procedure manual section is applicable in the instant case.

As appellant's physician, Dr. Halaby, erroneously combined impairment percentages from two incompatible tables, his opinion as to appellant's total permanent impairment greatly overstated the actual degree of impairment and, therefore, is of diminished probative value in appellant's schedule award determination.

However, Dr. Halaby did provide individual impairment ratings in accordance with the A.M.A., *Guides* for appellant's atrophy and for her arthritis due to joint space cartilage loss. Dr. Halaby found that appellant had a 10 percent impairment due to cartilage loss, or an 11 percent impairment due to atrophy. As the impairment rating for loss of cartilage is less than the impairment for atrophy, under Board precedent the greater permanent impairment rating for atrophy should have been used to determine appellant's total right lower extremity permanent impairment.<sup>9</sup>

Appellant's schedule award as determined by the Office medical adviser for a total of 10 percent permanent impairment was based on her loss of cartilage using Table 62. The Office medical adviser did not provide an impairment rating for appellant based on her atrophy and did not explain why he chose to base her impairment on Table 62 rather than on Table 77. However, Dr. Halaby did identify a permanent impairment for appellant due to her atrophy of 11 percent using Table 77.

Therefore, the case will be remanded to the Office for further review and a determination of appellant's permanent impairment in accordance with the proper application of the A.M.A., *Guides* and Chapter 3.700 of the FECA Procedure Manual.

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<sup>6</sup> See *Paul A. Toms*, 28 ECAB 403 (1987).

<sup>7</sup> A.M.A., *Guides* Tables 35 to 69, pp. 75-89 (fourth edition 1993).

<sup>8</sup> Federal (FECA) Procedure Manual, Part – 3, Medical, *Schedule Awards*, Chapter 3.700 (October 1995).

<sup>9</sup> See, e.g., *Patricia J. Lieb*, 42 ECAB 861 (1991); *Harold T. Nelson*, 42 ECAB 763 (1991); see also A.M.A., *Guides*, Chapter 3.2I, p. 84, (it is recommended that the section providing the greater impairment estimate be used).

Consequently, the decisions of the Office of Workers' Compensation Programs dated August 27, July 10 and April 16, 1998 are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, D.C.  
May 22, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member