

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LILLIA C. PAYNE and DEPARTMENT OF THE ARMY,
Fort Sam Houston, TX

*Docket No. 00-188; Submitted on the Record;
Issued November 16, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
VALERIE D. EVANS-HARRELL

The issue is whether appellant has more than a 28 percent permanent impairment to the right leg.

On March 11, 1994 appellant, a military personnel clerk, filed a traumatic injury claim alleging that on that date she sustained a right knee injury as a result of a slip and fall while in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for chondromalacia patella of the right knee. By decision dated August 29, 1996, the Office issued a schedule award for a seven percent permanent impairment to the right leg. In a decision dated May 25, 1999, the Office issued a schedule award for an additional 21 percent permanent impairment to the right leg.

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

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

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).

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

In a report dated March 24, 1998, Dr. Frank Garcia, an orthopedic surgeon, opined that appellant had a 30 percent permanent impairment to the right leg. Dr. Garcia explained that under Table 64, appellant had a 7 percent impairment for patellar subluxation, and a 25 percent impairment for status post tibia tubercle elevation.³ In a report dated July 16, 1998, an Office medical adviser disagreed with Dr. Garcia's application of Table 64. The medical adviser opined that the impairment for proximal tibial osteotomy under Table 64 referred to an osteotomy of the long axis of the tibia, not an osteotomy of the tibia tubercle.

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁴ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁵

In this case, the Office did undertake additional development of the evidence, but the record remains in conflict on the degree of permanent impairment. The Office referred appellant to Dr. Salvatore P. Baylan, a specialist in physical medicine serving as a second opinion physician. Dr. Baylan's January 29, 1999 report is of diminished probative value in that he combined impairments under Table 64 with impairments for loss of flexion and extensor weakness. As noted by a second Office medical adviser in an April 19, 1999 report, the A.M.A., *Guides* does not contemplate using both a diagnosis based impairment under Table 64 and physical examination findings such as loss of motion and weakness.⁶ Although Dr. Baylan noted only a seven percent impairment under Table 64, he does not specifically discuss the issue of proximal tibia osteotomy or explain why this would not be an appropriate impairment under Table 64 in this case. The April 29, 1999 report from the Office medical adviser applies the physical examination impairments for loss of motion and weakness, without discussing Dr. Garcia's report.

Accordingly, the Board finds that there remains an unresolved conflict as to whether a proper application of the A.M.A., *Guides* would include proximal tibial osteotomy under Table 64, or whether an impairment rating based on the physical examination findings for loss of motion and weakness is more appropriate in this case. The Office should refer appellant to an appropriate impartial specialist for resolution of the conflict. After such further development as it deems necessary, it should issue an appropriate decision.

³ A.M.A., *Guides* (4th ed. 1993), 85, Table 64. Dr. Garcia indicated that he applied the impairment for proximal tibia osteotomy, good result.

⁴ *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

⁵ *William C. Bush*, 40 ECAB 1064 (1989).

⁶ A.M.A., *Guides*, 84.

The decision of the Office of Workers' Compensation Programs dated May 25, 1999 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC
November 16, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Valerie D. Evans-Harrell
Alternate Member