

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN J. CLEAVER and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 00-406; Submitted on the Record;
Issued November 15, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has greater than a 37 percent loss of use of his left leg.

The Office of Workers' Compensation Programs accepted that appellant's August 8, 1989 employment injury, in which he twisted his left knee, resulted in a torn medial meniscus, for which it authorized surgery that was performed on November 15, 1990. Appellant filed a claim for a schedule award, and on March 3, 1992 the Office issued a schedule award for a 24 percent permanent loss of use of the left leg.

By letter dated March 28, 1996, the Office authorized the total knee replacement recommended by appellant's attending physician, Dr. Gregory S. Maslow. On October 7, 1996 Dr. Maslow performed a total knee arthroplasty. Appellant filed another claim for a schedule award, and on June 2, 1997 the Office issued a schedule award for an additional 13 percent permanent loss of use of the left leg, for a total of 37 percent. This award was affirmed by an Office hearing representative in a decision dated December 24, 1997, and in a September 8, 1998 Office decision issued in response to appellant's request for reconsideration.

By letter dated February 9, 1999, appellant requested reconsideration, and submitted a medical report dated January 21, 1999 from Dr. John Potash concluding that appellant had a 75 percent loss of use of his left leg due to a poor result from his total knee replacement. The Office referred appellant and his prior medical reports to Dr. Steven Valentino for a second opinion evaluation of the permanent impairment of his left leg, and in a report dated March 22, 1999, Dr. Valentino concluded that appellant had a 37 percent permanent loss of use of his left leg, and an Office medical adviser stated that Dr. Valentino's report showed a 37 percent impairment of the left leg for a total knee replacement with a good result. The Office determined that this report created a conflict of medical opinion with the report of Dr. Potash, and referred appellant, the case record and a statement of accepted facts to Dr. David R. Pashman to resolve this conflict. In a report dated June 24, 1999, Dr. Pashman concluded that appellant had a 15 percent impairment of the whole person due to his left total knee arthroplasty.

By decision dated July 21, 1999, the Office found that appellant had no greater than a 37 percent permanent loss of use of his left leg.

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.³

The Board finds that the case is not in posture for a decision.

As found by the Office, there was a conflict of medical opinion on the extent of appellant's permanent impairment of the left leg between appellant's physician, Dr. Potash, and the Office's referral physician, Dr. Valentino. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Act,⁴ referred appellant, the case record and a statement of accepted facts to Dr. Pashman. In a June 24, 1999 report, Dr. Pashman rated appellant's permanent impairment of the left leg using the tables of the A.M.A., *Guides* for gait derangement⁵ and for loss of motion.⁶ Dr. Pashman did not use the tables of the A.M.A., *Guides* that directly address the impairment due to a total knee replacement,⁷ and did not provide any explanation why these tables were not used. The tables for total knee replacement were used by the Office in issuing its schedule award for a 37 percent loss of use of the left leg, by Dr. Potash, by Dr. Valentino, and by an Office medical adviser reviewing Dr. Valentino's report.

It appears that Dr. Pashman did not use the total knee replacement table because he did not believe that appellant's total knee replacement is related to his August 8, 1989 employment injury. The Board has held, however, that disability resulting from surgery authorized by the Office is compensable, even if the surgery is not for an employment-related condition.⁸ The case will be remanded to the Office for procurement of a supplemental opinion from Dr. Pashman

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

³ *Quincy E. Malone*, 31 ECAB 846 (1980).

⁴ 5 U.S.C. § 8123(a) states in pertinent part "If there is 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."

⁵ Table 36 of Chapter 3 of the fourth edition of the A.M.A., *Guides*.

⁶ Table 41 of Chapter 3 of the fourth edition.

⁷ Tables 64 and 66 of the fourth edition.

⁸ *Carmen Dickerson*, 36 ECAB 409 (1985).

rating appellant's permanent loss of use of the left leg using the appropriate tables for a total knee replacement.⁹

The decision of the Office of Workers' Compensation Programs dated July 21, 1999 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
November 15, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁹ The Board has also held that in a situation where the Office secures an opinion from an impartial medical specialist and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. *Harold Travis*, 30 ECAB 1071 (1979).