

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN BLUE and U.S. POSTAL SERVICE,
POST OFFICE, Bayonne, NJ

*Docket No. 99-961; Submitted on the Record;
Issued November 6, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant is entitled to compensation for more than a 12 percent permanent impairment of the left lower extremity, for which he received a schedule award.

The Office of Workers' Compensation Programs accepted that appellant, a letter carrier, was struck by a motor vehicle and sustained injuries while in the performance of duty. Appellant's claim was accepted for a nondisplaced proximal right fibula fracture; right ankle sprain; left knee hematoma; spinal evulsion fracture; and torn medial meniscus of the left knee, which required arthroscopic surgery.

Appellant stopped work on November 21, 1990, returned to a limited-duty position on April 28, 1992 and worked intermittently while receiving treatment and undergoing surgery for his injuries. He was paid appropriate medical benefits and compensation for lost wages.

Dr. David Weiss, an osteopath, examined appellant to determine the extent of permanent impairment resulting from his employment injuries. Dr. Weiss stated in a report dated August 25, 1995 that according to Table 64, on page 85 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fourth edition, appellant sustained a 10 percent impairment based on the partial meniscectomy of the left knee. He further stated that according to Tables 38 and 39, on page 77 of the A.M.A., *Guides*, he sustained a 12 percent impairment due to muscle strength loss of the left quadriceps. Dr. Weiss concluded that appellant sustained a total impairment of 22 percent of the left lower extremity.

The Office medical adviser reviewed Dr. Weiss' conclusions and in a report dated June 11, 1997 found that Dr. Weiss's assessment of 10 percent permanent impairment based on the partial medial meniscectomy was correct. However, the Federal Employees' Compensation Act (FECA) Bulletin No. 95-17 precluded the use of Tables 38 and 39, page 77 of the A.M.A., *Guides* in conjunction with Table 64, page 85. Therefore, appellant had a total of 10 percent impairment of the left lower extremity instead of 22 percent as determined by Dr. Weiss.

By decision dated June 17, 1997, the Office issued a schedule award for 10 percent permanent impairment of the left lower extremity.

Appellant, through counsel, disagreed with the Office decision and requested an oral hearing. At the January 28, 1998 hearing, appellant testified regarding his work-related injury and his light-duty assignment with the employing establishment. His counsel argued that there was a disparity in ratings given by Dr. Weiss, who properly assessed an impairment of 22 percent in accordance with the A.M.A., *Guides*, and the Office medical adviser who assessed a 10 percent impairment without supporting his conclusion.

Appellant's counsel urged that appellant's rating should be given in conformity with Dr. Weiss' report, which found a 12 percent impairment for muscle strength loss. The Office medical adviser apparently only assessed 10 percent impairment because certain tables in the A.M.A., *Guides* could not be used together. Counsel argued that the Office medical adviser apparently relied on a FECA Bulletin that had not been adopted by the Board, instead of Dr. Weiss' report, and that the Office should have at least found a conflict in medical opinion.

By decision dated March 30, 1998, the Office hearing representative affirmed the prior decision but increased the schedule award to 12 percent impairment of the left lower extremity. The hearing representative found that the Office medical adviser did not indicate that Dr. Weiss erred in determining a 12 percent impairment due to loss of muscle strength according to Tables 38 and 39 of the A.M.A., *Guides*. He further found that the Office medical adviser properly determined that Tables 38 and 39 and Table 64 are mutually exclusive in evaluating permanent impairment under the A.M.A., *Guides* when using alternative methods of computing permanent impairment, the higher percentage of impairment should be used. Therefore, appellant had a 12 percent impairment of the left lower extremity. In accordance with the hearing representative's decision, the Office issued a schedule award for an additional two percent permanent impairment of the left lower extremity on April 13, 1998.

The Board finds that appellant is not entitled to any more than a 12 percent permanent impairment of the left lower extremity, for which he received a scheduled award.

Section 8107 of the Federal Employees' Compensation Act¹ and its implementing regulations² 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 A.M.A., *Guides* have been adopted by the Office, and the Board has concurred in such adoption as an appropriate standard for evaluating losses.³

¹ 5 U.S.C. § 8107(c).

² 20 C.F.R. § 10.404.

³ A.M.A., *Guides*.

On appeal, appellant's representative argues that appellant has provided detailed medical evidence in conformity with the A.M.A., *Guides* establishing that he has sustained a 22 percent impairment to his left lower extremity and that such evidence should have been given determinative weight. He further argues that as the Office medical adviser determined that appellant had no greater than a 12 percent impairment to his left lower extremity, the Office should refer the matter to a proper referee physician to resolve the conflict of medical opinion evidence between the Office medical adviser and Dr. Weiss.

FECA Bulletin No. 95-17, issued March 23, 1995, provides that "[w]hen a table based on a specific diagnosis is used, no additional increment for pain and loss of strength should be included in the determination of impairment."⁴ The subject of the FECA Bulletin No. 95-17 is duplication of awards by using tables with overlapping applications. It instructs that care must be taken to avoid duplication of impairments by the incorrect application of mutually exclusive tables, and it provides a list of such mutually exclusive tables.

Although appellant's representative contends that appellant's physician provided an impairment rating in conformity with the A.M.A., *Guides*, appellant's physician calculated impairments from mutually exclusive tables and then added them, resulting in duplication of impairment and an incorrect impairment rating in contravention of the guidelines provided. Dr. David Weiss, an osteopath, added 12 percent impairment for right quadriceps muscle weakness to 10 percent impairment for the partial meniscectomy left knee to arrive at his 22 percent left lower extremity permanent impairment. Consequently, Dr. Weiss' impairment determination was not made in accordance with FECA Bulletin 95-17 and, therefore, has little probative value.

The Board notes that the Office hearing representative in the March 30, 1998 decision, properly relied on Dr. Weiss' assessment that appellant had a 12 percent permanent impairment due to loss of muscle strength according to Tables 38 and 39 of the A.M.A., *Guides*, after determining that it had not been challenged by the Office medical adviser. The Office, therefore, properly calculated an impairment rating in accordance with the A.M.A., *Guides*, which constitutes the weight of the medical opinion evidence in determining that appellant has no greater than a 12 percent permanent impairment of his left lower extremity, for which he had received a schedule award.

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, exh. 4 (October 1995).

The decision of the Office of Workers' Compensation Programs dated March 30, 1998 is affirmed.

Dated, Washington, DC
November 6, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member