

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HARRY OLMO and DEPARTMENT OF THE NAVY,  
NAVAL MEDICAL COMMAND, Philadelphia, PA

*Docket No. 99-1855; Submitted on the Record;  
Issued November 7, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
PRISCILLA ANNE SCHWAB

The issue is whether appellant has more than a 10 percent permanent impairment of his right leg for which he received a schedule award.

This is the second appeal in the present case. In the prior appeal,<sup>1</sup> the Board set aside the March 16 and November 2, 1995 decisions of the Office of Workers' Compensation Programs and remanded the case to the Office for further proceedings. The Board determined that further clarification was needed of the opinion of Dr. Joseph A. Fabiani, the Board-certified orthopedic surgeon who served as the impartial medical examiner.<sup>2</sup> The Board directed Dr. Fabiani to provide a supplemental report which included results of range of motion testing and otherwise showed how his evaluation was conducted in accordance with the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993). The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office requested that Dr. Fabiani provide a supplemental report regarding the extent of appellant's right leg impairment. In a report dated April 16, 1998, he detailed the findings of his examination on that date. Dr. Fabiani noted that appellant reported pain in his right knee in the medial aspect of the patella and down along the patella tendon and joint, but that the pain "varies all the time" and could be "high" or "low." He noted that examination of the right knee showed no significant quadriceps atrophy and no ligament instability. Dr. Fabiani noted that appellant was only able to flex both knees to 105 degrees and indicated that he might

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<sup>1</sup> Docket No. 96-924 (issued January 27, 1998).

<sup>2</sup> The Office had accepted that appellant sustained an employment-related sprain of the medial ligament of his right knee on February 27, 1989. By decision dated March 16, 1995, the Office denied appellant's request for a schedule award on the grounds that the September 30, 1993 report of Dr. Fabiani did not show that he had permanent impairment of his right leg which would entitle him to a schedule award.

have some disability based on this finding.<sup>3</sup> He stated that appellant exhibited “very early, very mild” chondromalacia of the medial facet of the patella.

By decision dated June 2, 1998, the Office granted appellant a schedule award for a 10 percent permanent impairment of his right leg. The award ran for 28.20 weeks from April 16 to November 3, 1998. The Office based its award on the supplemental opinion of Dr. Fabiani.<sup>4</sup> By decision dated and finalized June 8, 1999, an Office hearing representative affirmed the Office’s June 2, 1998 decision.

The Board finds that appellant does not have more than a 10 percent permanent impairment of his right leg for which he received a schedule award.

An employee seeking compensation under the Federal Employees’ Compensation Act<sup>5</sup> has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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 A.M.A., *Guides* (4<sup>th</sup> ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>9</sup>

The Board finds that the April 16, 1998 report of Dr. Fabiani, the Board-certified orthopedic surgeon who served as the impartial medical examiner, shows that appellant is entitled to a schedule award for no more than a 10 percent permanent impairment of his right leg. Appellant’s right knee flexion to 105 degrees would entitle him to an impairment rating of 10 percent based on loss of motion.<sup>10</sup> Appellant does not have any motor loss or atrophy which would entitle him to a further impairment rating.<sup>11</sup> Appellant would not be entitled to an

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<sup>3</sup> Dr. Fabiani suggested that appellant’s limited motion might be voluntary.

<sup>4</sup> The record contains a May 26, 1998 report in which an Office medical adviser calculated an impairment rating based on Dr. Fabiani’s opinion.

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

<sup>7</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>8</sup> 5 U.S.C. § 8107(a).

<sup>9</sup> See *Dale B. Larson*, 41 ECAB 481, 490 (1990); *Pedro M. DeLeon, Jr.*, 35 ECAB 487, 492 (1983).

<sup>10</sup> See A.M.A., *Guides*, 78, Table 41.

<sup>11</sup> Appellant’s chondromalacia would not provide an impairment, as it did not preexist his employment injury. See *Dale B. Larson*, *supra* note 9; *Pedro M. DeLeon, Jr.*, *supra* note 9.

impairment rating for his reported pain, which was not associated with any particular nerve distribution, as the pain would be accounted for in his rating for limited range of motion.<sup>12</sup>

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>13</sup> As the opinion of Dr. Fabiani provided the only evaluation that conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.<sup>14</sup>

Appellant has argued that the Office should have applied the standards of the third edition of the A.M.A., *Guides* (1989) rather than the fourth edition of the A.M.A., *Guides* (1993). However, it was appropriate to use the fourth edition in that the current edition of the A.M.A., *Guides* is used when an employee claims entitlement to additional impairment which occurs due to additional employment exposure after the initial Office determination of schedule award entitlement.<sup>15</sup>

Appellant also asserted that the Office improperly relied on the report of the Office medical adviser resolving the conflict in the medical evidence regarding appellant's schedule award entitlement. However, the Office actually based its schedule award determination on the opinion of Dr. Fabiani, the impartial medical examiner, and his report was sufficiently detailed to serve as such a basis.

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<sup>12</sup> See A.M.A., *Guides*, 13. Appellant's reported pain, which was highly variable in nature, would not qualify for a chronic pain rating under Chapter 15 of the A.M.A., *Guides*, 303-13.

<sup>13</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>14</sup> See *Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

<sup>15</sup> See *Roy L. Brandt*, 41 ECAB 569, 578-80 (1990). Moreover, the fourth edition of the A.M.A., *Guides* was also in effect at the time of the Office's initial determination of appellant's schedule award entitlement in 1995. The effective date of the fourth edition of the A.M.A., *Guides* is November 1, 1993. FECA Bulletin No. 94-4 (issued November 1, 1993).

The decisions of the Office of Workers' Compensation Programs dated and finalized June 8, 1999 and dated June 2, 1998 are hereby affirmed.

Dated, Washington, DC  
November 7, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Priscilla Anne Schwab  
Alternate Member