

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD P. PROVENZANO and DEPARTMENT OF VETERANS
AFFAIRS, LONG BEACH VETERANS ADMINISTRATION MEDICAL CENTER,
Long Beach, CA

*Docket No. 00-2281; Submitted on the Record;
Issued August 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant has more than a 14 percent permanent impairment to his right leg for which he received a schedule award.

This case is on appeal to the Board for the second time.¹ On the first appeal, the Board reviewed the February 11, 1997 decision, by which the Office of Workers' Compensation Programs' hearing representative relied on the opinion of the district medical adviser dated December 27, 1995, to determine that appellant had a three percent permanent impairment to his right leg. The Board found that a conflict existed between the district medical adviser's opinion and the opinion of Dr. David Weiss, an osteopathic practitioner, who stated that appellant had a 25 percent permanent impairment to his right leg. The Board, therefore, vacated the Office hearing representative's decision and remanded the case for the Office to refer appellant, the case record and a statement of accepted facts to an impartial medical specialist to resolve the conflict.

On remand, the Office referred appellant to the impartial medical specialist, Dr. Irving D. Strouse, a Board-certified orthopedic surgeon. In his report dated July 5, 1999, Dr. Strouse found that the range of motion of appellant's right knee was 0 to 115 degrees and that appellant had 10 degrees of dorsiflexion of the right ankle and 35 degrees of plantar flexion. He found that there was 25 degrees of inversion and eversion. Dr. Strouse found that appellant had two centimeters atrophy of the right thigh. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), he found that appellant's impairment due to his medial meniscectomy of the right knee corresponded to a one percent whole person impairment or a two percent impairment of the right lower extremity using Table 64, page 85. Dr. Strouse found that the two centimeters of atrophy of appellant's right thigh corresponded to a three percent whole person impairment or an eight percent impairment of the right lower

¹ Docket No. 89-149 (issued April 16, 1999). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

extremity using Table 37, page 77. He concluded that appellant had a total 4 percent whole person impairment, which corresponded to an 11 percent impairment to the right lower extremity. Dr. Strouse also stated that the “hypothesia along the lateral aspect of the lower leg and lateral foot are considered unrelated to the injury of January 13, 1993 and related to his preexisting Achilles tendon injury and subsequent injury.”

In notes dated July 5, 1999, the district medical adviser determined that the two percent figure for the mesnicectomy and the eight percent figure for the atrophy could not be used together and, therefore, appellant had an eight percent permanent impairment to his right lower extremity.

By decision dated July 22, 1999, the Office issued appellant a schedule award for a five percent permanent impairment to the right lower extremity in addition to appellant’s prior award for a three percent impairment to his right lower extremity. The Office obtained the five percent figure by relying on the district medical adviser’s July 5, 1999 note.

By letter dated July 27, 1999, appellant requested an oral hearing before an Office hearing representative, which was held on February 1, 2000. Appellant’s attorney appeared. He argued that Dr. Strouse’s opinion was not probative because he did not address whether appellant had complete disruption of the anterior cruciate ligament resulting from the surgery. He also stated that Dr. Strouse did not address appellant’s Achilles tendon injury his muscle weakness, the flexion of his right knee and appellant’s arthritis based on x-ray.

The Office hearing representative referred appellant to another district medical adviser to address the effects of appellant’s injury to his right knee and the injury to his Achilles tendon. In a report dated March 9, 2000, the district medical adviser stated that appellant’s range of motion was measured to be 0 to 115 degrees and using Table 41, page 78 of the A.M.A., *Guides* (4th ed. 1994), appellant has no impairment based on the range of motion of the knee. He found that appellant had two centimeters of right thigh atrophy, which using Table 37, page 77, equated to an eight percent impairment to the right lower extremity. The district medical adviser found that no award should be given for the partial meniscectomy because the A.M.A., *Guides* (4th ed. 1994) preclude the use of several methods for determining the impairment of one specific anatomic entity. He determined that appellant’s decreased right ankle range of motion referring to dorsiflexion and extension of 10 degrees equated to a 7 percent impairment of the right lower extremity using Table 42, page 78. Using the Combined Values Chart, page 323, the district medical adviser determined that the 8 percent and 7 percent impairments resulted in a 14 percent impairment to appellant’s right lower extremity.

By decision dated March 22, 2000, the Office hearing representative modified the Office’s July 22, 1999 decision, to reflect that appellant had a 14 percent impairment to his right leg although he also stated that “[I]n so far as the decision denied payment of any schedule award in excess of 14 percent, it is affirmed.” The Office hearing representative, in effect, however, modified the Office’s July 22, 1999 decision, to reflect a schedule award of 14 percent for appellant’s right leg as the 14 percent award is consistent with the Office hearing representative’s findings in his decision. The Office hearing representative also stated that the Office should determine if appellant received increased benefits from the employing establishment as a result of his January 13, 1993 employment injury and if so, he should be

offered an election between an additional schedule award of six percent and any increase in benefits which he received.

The Board finds that appellant is not entitled to more than a 14 percent permanent impairment to his right leg for which he received a schedule award.

The schedule award provision of the Federal Employees' Compensation Act² provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.³ 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.⁴

In this case, as instructed by the Board, the Office referred appellant to an impartial medical specialist, Dr. Strouse, to resolve the conflict between Dr. Weiss' opinion that appellant had a 25 percent permanent impairment to his right leg and the district medical adviser's opinion that appellant had a 3 percent permanent impairment to his right leg. In his July 5, 1999 report, using the A.M.A., *Guides* (4th ed. 1994), Dr. Strouse determined that appellant had a one percent whole person impairment or two percent impairment of his right lower extremity based on his partial meniscectomy, using Table 64, page 85 and that appellant had a three percent whole person impairment or an eight percent impairment to his right lower extremity based on his two centimeters of thigh atrophy using Table 37, page 77. Without a clear explanation, he concluded that appellant had a total impairment of 11 percent to his right lower extremity. Dr. Strouse did not include any impairment resulting from appellant's Achilles tendon.

In his March 9, 2000 report, the district medical adviser excluded Dr. Strouse's calculation of the impairment of appellant's partial meniscectomy since the A.M.A., *Guides* (4th ed. 1994) preclude use of Table 64, page 85 with Table 37. His calculation that appellant had an 8 percent impairment to his right lower extremity using Table 37, page 77. He included an impairment for appellant's Achilles tendon, finding that the dorsiflexion and extension of 10 degrees equated to a 7 percent permanent impairment using Table 42, page 78. Using the Combined Values Chart, page 323 of the A.M.A., *Guides* (4th ed. 1994), the district medical adviser determined that the 8 percent and 7 percent impairments combined for an impairment of 14 percent to appellant's right lower extremity.

The Board finds that the district medical adviser properly used the A.M.A., *Guides* (4th ed. 1994). He properly excluded an impairment rating for appellant's partial meniscectomy.⁵

² 5 U.S.C. § 8107 *et seq.*

³ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Daniel C. Goings*, 37 ECAB 781, 783 (1986).

⁴ *Arthur E. Anderson*, *supra* note 3 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

⁵ *See Richard D. Provenzano*, *supra* note 1, page 3 n. 11.

The district medical adviser properly used Table 37, page 77 to determine that appellant's 2 centimeters of thigh atrophy resulted in an 8 percent impairment and properly used Table 42, page 78 to determine that appellant's dorsiflexion of the right ankle of 10 degrees resulted in a 7 percent impairment. Further, he properly used the Combined Values Chart to determine that appellant had an impairment of 14 degrees to his right lower extremity. The district medical adviser's figure of dorsiflexion of the ankle of 10 percent was consistent with Dr. Strouse's figure. Dr. Strouse and the district medical adviser also agreed on the eight percent impairment resulting from appellant's two centimeters of atrophy. The district medical adviser's opinion is sufficiently rational to constitute the weight of the evidence.

The March 22, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.⁶

Dated, Washington, DC
August 1, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ The Office, however, should comply with the Office hearing representative's instructions to allow appellant an election of an increased award or increased benefits.