

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HARVEY KATZOWITZ and DEPARTMENT OF JUSTICE,  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, Falls Church, VA

*Docket No. 00-2304; Submitted on the Record;  
Issued August 20, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether appellant is entitled to greater than a 13 percent permanent impairment of the right lower extremity for which he received a schedule award.

On June 17, 1998 appellant, then a 61-year-old clerk, was injured in the performance of duty when he slipped on carpet and fell hitting his head and knee on a table. He first received treatment at a local hospital where his right knee was placed in an immobilizer. An x-ray taken at the hospital showed a comminuted fracture of the right patella. The Office of Workers' Compensation Programs accepted appellant's traumatic injury claim for open wound of the chin and a fracture of the right patella. He was off work from June 17, 1998 and received appropriate compensation until he returned to full duty on October 19, 1998.

On November 11, 1998 appellant filed a CA-7 claim for a schedule award.<sup>1</sup>

Appellant also submitted a Form CA-1086 for an attendant allowance. He indicated that he was completely dependent on his wife and that she should be recompensed for her efforts.

In a decision dated February 16, 1999, the Office denied appellant's claim for an attendance allowance on the grounds that the completed CA-1086 and CA-1090 forms did not contain a physician's signature and therefore could not be deemed medical evidence.

In a decision dated March 19, 1999, the Office denied appellant's claim for an attendant allowance, noting that although appellant had resubmitted CA-1086 and CA-1090 forms with a valid physician's signature, his assistant was not qualified under the new Federal Employees' Compensation Act regulations.

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<sup>1</sup> The record indicates that appellant fell on December 17, 1998 while walking to a doctor's appointment when he tripped on the sidewalk. Medical records report a diagnosis of a fracture of the left wrist for which a splint was applied. By letter dated April 6, 1999, appellant indicated that he was seeking compensation and a schedule award for consequential injuries to both hands and his left wrist.

On February 25, 1999 the Office asked Dr. Isaac Cohen, appellant's treating physician and a Board-certified orthopedist, to prepare an impairment rating for appellant's accepted condition of right knee fracture and chin injury based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*).

On a Form CA-1303 dated February 25, 1999, Dr. Cohen noted that appellant demonstrated active flexion of 110 degrees and retained extension of 110 degrees in the right knee. He opined that appellant had a 20 percent impairment of the right lower extremity but he made no reference to the A.M.A., *Guides*.

In a report dated March 22, 1999, an Office medical adviser, Dr. Daniel Kalash, indicated that he had reviewed Dr. Cohen's report and that the flexion of 110 degrees equaled 10 percent permanent impairment of the right lower extremity at page 78, Table 41 of the A.M.A., *Guides*.

On March 29, 1999 the Office issued appellant a schedule award for a 10 percent permanent impairment of the right lower extremity. The period of the award was February 25 to September 14, 1999.

Appellant requested a hearing, which was held on October 27, 1999.

A magnetic resonance imaging (MRI) scan dated March 30, 1999 revealed old appearing patellar fracture, small joint effusion and degenerative changes of the medial meniscus without a superimposed tear being evident.

In a decision dated January 21, 2000, an Office hearing representative modified the Office's March 19, 1999 decision to reflect that the new regulations of the Act were not applicable to the attendant issue but that the medical evidence did not support an allowance for an attendant under 5 U.S.C. § 8111(a).<sup>2</sup> The Office hearing representative, however, vacated the Office's March 29, 1999 decision with respect to the percentage of the schedule award and remanded the case for further development. It was noted that the Office medical adviser had not properly explained his impairment rating.

On remand the Office referred appellant for a second opinion evaluation with Dr. Ernest S. Barash, a Board-certified orthopedic surgeon, on May 1, 2000. In a report dated May 22, 2000, he noted appellant's history of injury. Dr. Barash noted that on December 17, 1998 appellant was walking to his physician's office when he fell and further injured his knees, both elbows and hands. According to him, the injuries sustained by appellant at that time were attributable to muscle weakness in appellant's right leg secondary to his work injury.

On physical examination, Dr. Barash indicated that appellant had essentially normal gait, full knee extension and flexion of better than 140 degrees. There was no evidence of effusion and full stability in the patella, with only slight tissue thickening. Dr. Barash further noted that the right quadriceps were over three centimeters smaller in circumference than the left. He stated

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<sup>2</sup> The Office hearing representative noted a November 4, 1998 report from appellant's treating physician, Dr. Cohen, indicating that appellant was able to feed, dress and bathe himself unattended. He did state that appellant required assistance by his wife in all daily activities.

that appellant had a 13 percent deficit of the right lower extremity due to severe quadriceps atrophy and a sensory deficit of 7½ percent as a “class 2 events (Table 20, page 151).” Dr. Barash noted that appellant had five percent impairment for sensitivity deficit for the pisiform fracture of his left wrist from the fall in December 1998, but that the condition was not listed on the Office’s statement of accepted facts. Thus, he concluded that appellant had a 20½ additional deficit of the right lower extremity.

An Office medical adviser, Dr. Daniel D. Zimmerman, subsequently reviewed the May 27, 2000 report by Dr. Barash and noted that appellant had greater than 3 centimeters atrophy of the right quadriceps. Applying Table 37 of the A.M.A., *Guides*, the Office medical adviser opined that appellant had a 13 percent permanent impairment of the right lower extremity. He added that the FECA Bulletin 95-17 precludes a rating to be derived using Table 20 or 21 if a rating from Table 37 is used. He further stated that the only basis of an impairment rating using Dr. Barash’s physical findings was the reported atrophy of the quadriceps.

In a June 1, 2000 decision, the Office issued appellant an additional schedule award for three percent permanent impairment of the right lower extremity.

The Board finds that appellant is not entitled to greater than a 13 percent permanent impairment of the right lower extremity for which he was awarded a schedule award.<sup>3</sup>

Under section 8107 of the Federal Employees’ Compensation Act<sup>4</sup> and section 10.304 of the implementing federal regulations,<sup>5</sup> schedule awards are payable for the permanent impairment of specified body members, functions and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.<sup>6</sup> However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.<sup>7</sup> The method used in making such determinations rests in the sound discretion of the Office.<sup>8</sup> For consistent results and to ensure equal justice for all claimants, the Office has adopted and the Board has approved the use of the appropriate edition of the A.M.A., *Guides* as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.<sup>9</sup>

In the present case, the Office originally issued an impairment for 10 percent impairment of the right leg, which appellant contested and was then awarded an additional 3 percent

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<sup>3</sup> The Board herein adopts the findings of the Office hearing representative with respect to the denial of the attendant allowance.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 20 C.F.R. § 10.304.

<sup>6</sup> 5 U.S.C. § 8107(c)(19).

<sup>7</sup> *A. George Lampo*, 45 ECAB 441, 443 (1994).

<sup>8</sup> *George E. Williams*, 44 ECAB 530, 532 (1993).

<sup>9</sup> *James J. Hjort*, 45 ECAB 595, 599 (1994).

impairment based on the report of the Office medical adviser, Dr. Zimmerman. The Board has duly reviewed the record and concludes that the schedule award of a total of 13 percent impairment is appropriate. On remand, Dr. Barash examined appellant and noted that appellant was entitled to 13 percent permanent impairment under Table 37 of the A.M.A., *Guides* for reported atrophy of the quadriceps. This finding is consistent with Dr. Zimmerman's report. The only difference in opinion between Drs. Barash and Zimmerman is whether appellant is entitled to an additional 7½ percent impairment for sensory deficit at Table 20 of the A.M.A., *Guides*. The Board finds that Dr. Zimmerman was correct in his conclusion that Table 20 could not be applied in conjunction with Table 13 under FECA Bulletin 95-17. Accordingly, the Office's determination to award appellant an additional three percent schedule award impairment for permanent impairment of the right lower extremity was properly based on the report and recommendation of the Office medical adviser.

The decision dated June 1, 2000 of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
August 20, 2001

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member