

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD R. KRAYNAK and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Colts Neck, NJ

*Docket No. 00-1541; Submitted on the Record;
Issued October 2, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

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

The Office of Workers' Compensation Programs accepted that appellant, a materials handler, sustained right knee injuries while in the performance of duty on September 25, 1992 and August 25, 1995, which resulted in contusion and degenerative arthritis of the right knee.¹ Appellant underwent arthroscopic repair of the right knee cartilage on August 19, 1996, which was authorized by the Office. On January 8, 1999 appellant requested a schedule award.

By decision dated January 19, 1999 the Office granted appellant a schedule award for a 13 percent permanent impairment of the right lower extremity. Appellant thereafter requested a hearing which was held on February 3, 1999. By decision dated December 2, 1999, finalized December 6, 1999, the Office hearing representative affirmed the January 19, 1999 decision.

In support of his claim for a schedule award, appellant submitted a December 7, 1998 report from Dr. David Weiss, an osteopath. In this report, Dr. Weiss noted the following: post-traumatic internal derangement to the right knee with a tear of the medial meniscus, arthroscopic surgery with a partial medial meniscectomy, degenerative joint disease of the right knee confirmed by magnetic resonance imaging (MRI) and direct visualization arthroscopy; chondromalacia patella of the right knee and chronic right ankle strain and sprain involving the deltoid ligament.

Dr. Weiss stated that appellant walked with a slight right-sided limp, and described in detail his physical examination of appellant's knee. Range of motion testing revealed restriction and pain on flexion-extension, as well as marked crepitus on active range of motion of the right knee. Gastroc circumference measured 45½ cm on the right versus 44 cm on the left and the

¹ The Office also accepted that appellant twisted his right ankle on May 3, 1996 while in the performance of duty.

quads circumference at 10 cm above the patella measured 50 cm on the right versus 52½ cm on the left.

Dr. Weiss concluded that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,² Table 37, appellant's right thigh atrophy caused a 13 percent impairment of the right leg. Using Table 62, page 83, Dr. Weiss also calculated that appellant's right knee crepitation with patellofemoral pain caused a 5 percent impairment. Dr. Weiss then used the Combined Values Chart to conclude that appellant had a total combined permanent impairment of the right lower extremity of 17 percent.

On January 13, 1999 the Office medical adviser reviewed Dr. Weiss' report and concluded that appellant's right thigh atrophy had resulted in a 13 percent permanent impairment of the right lower extremity using Table 37 at page 77 of the A.M.A., *Guides*. The Office medical adviser noted that pursuant to FECA Bulletin No. 96-17, Table 62, impairment due to arthritis should be evaluated only if no other abnormality were present, with the exception of joint fractures. The Office medical adviser therefore concluded that appellant had a 13 percent permanent impairment of the right lower extremity, pursuant to Table 37 of the *Guides*.

On appeal appellant's representative asserts that the Office hearing representative erred in finding that FECA Bulletins Nos. 95-17 and 96-17 superseded the A.M.A., *Guides*. He further argues that a conflict therefore exists between Dr. Weiss' assessment of a 17 percent permanent impairment of the right lower extremity and the Office medical adviser's assessment of a 13 percent permanent impairment.

The Board finds that appellant has not established that he has more than a 13 percent permanent impairment of the right lower extremity.

Section 8107 of the Federal Employees' Compensation Act³ provides that, if there is permanent disability involving the loss or loss of use of a specific enumerated member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ The Act does not specify the manner by 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.⁵

² A.M.A., *Guides*, p. 77 (4th ed. 1994).

³ 5 U.S.C. §§ 8101-8193; § 8107.

⁴ *Id.* This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁵ *Mary L. Henninger*, 51 ECAB _____ (Docket No. 00-552, issued June 20, 2001); 20 C.F.R. § 10.404 (1999). The Office first utilized *A Guide to the Evaluation of Permanent Impairment of the Extremities and Back*, published in The Journal of the American Medical Association, Special Edition, February 15, 1958. From 1958 until 1971 a series of 13 *Guides* was published in the Journal of the American Medical Association. The American Medical Association published the first hardbound compilation edition of the *Guides* in 1971, which revised the previous

In *Harry D. Butler*,⁶ the Board noted that, as originally enacted in 1916, the Act did not make any provision for an award of compensation to an injured federal employee for permanent impairment of the body. No provision was made for schedule awards until the Act was amended on October 14, 1949. The Board stated that the legislative history pertaining to section 8107 of the Act was silent regarding the method for the evaluation of the extent of permanent impairment and concluded:

“[R]ather, it appears that this matter was left to the expertise of the Office in administering the compensation benefit program created under the Act. *Absent a specific statutory mandate by Congress to adopt a specific method for evaluating permanent impairment under section 8107, the Office has been left with the responsibility to reasonably accommodate the policies formulated under the Act.*”⁷ (Emphasis added.)

In addressing the scope of the Office’s authority to determine the method for evaluating permanent impairment to accommodate policy formulation,⁸ the Board reaffirmed that the method used in making schedule award determinations rested in the sound discretion of the Director.⁹

The principle that a single set of tables, the A.M.A., *Guides*, should be used so that uniform standards would be applicable to all claimants has been recognized by the Board since *August M. Buffa*.¹⁰ The Office codified this Board precedent within its implementing regulations at section 10.404 in January 1999.¹¹ The regulation provides in pertinent part:

“OWCP evaluates the degree of impairment to schedule members, organs and functions as defined in 5 U.S.C. 8107 according to the standards set forth in the specified (by OWCP) edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.”

The use of the A.M.A., *Guides* has been recognized by the Board as a means to achieve consistent results and to ensure equal justice under the law to all claimants.¹² In *Dennis E.*

series of JAMA *Guides*.

⁶ 43 ECAB 859 (1992).

⁷ *Supra* at 866.

⁸ *Supra* note 6 at 867.

⁹ The general grant of broad discretion to an agency in administering its statutory scheme was recognized by the United States Supreme Court in *Chevron U.S.A. Inc. v Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

¹⁰ 12 ECAB 324 (1961).

¹¹ 20 C.F.R. § 10.404.

¹² *Buffa*, *supra* note 10 at 325.

McCarthy,¹³ the Board explained that “The American Medical Association standards have been recognized by the Board and the Office as general *guides* which should be utilized where feasible in making schedule awards.”¹⁴ (Emphasis added.) The use of the A.M.A., *Guides* has never, however, limited the Office’s discretion to effectuate a just award of compensation under the Act or to achieve consistent or just results in the payment of schedule awards.

In *Buffa*,¹⁵ the Board explained that if the Office did, in the exercise of its discretion, deviate in any case from the usual practice suggested by the A.M.A., *Guides*, the record should reflect the basis for such deviation.¹⁶ The Office did so in this case.

Following publication of the fourth edition of the A.M.A., *Guides* made effective November 1, 1993, the Director issued FECA Bulletin No. 95-17 on March 25, 1995. The Director noted that the instructions for determining impairment under the fourth edition were “not always clear” and found that “impairment is sometimes calculated using tables with overlapping application, leading to percentages which greatly overstate the actual degree of impairment.”

To remedy this situation, the Director attached a list of tables and sets of tables that would be considered mutually exclusive. The Director ordered that, when evaluating impairment calculations, “claims and medical personnel should ensure that that the examining physician has not used tables which are mutually exclusive.” The policy reflected in the Director’s exercise of discretion in FECA Bulletin 95-17 was subsequently reiterated in FECA Bulletin 96-17 and incorporated in the FECA Procedure Manual at section 3-700, exhibit 4 in October 1995.¹⁷ Subsequent review by the Board has upheld the Director’s exercise of discretion in this interpretation of the A.M.A., *Guides*, fourth edition.¹⁸

While appellant’s treating physician, Dr. Weiss, used the A.M.A., *Guides* to conclude that appellant had a 17 percent permanent impairment of the right lower extremity, the Office medical adviser and the Office hearing representative limited appellant’s schedule award to 13

¹³ 26 ECAB 267 (1975).

¹⁴ *Id.* at 271.

¹⁵ *Supra* note 10.

¹⁶ *Buffa*, *supra* note 10 at 325.

¹⁷ The Board notes that both FECA Bulletins 95-17 and 96-17 were in effect for one year and have expired. These bulletins, however, were substantially incorporated into the FECA Procedure Manual at section 3-700, exhibit 4 in October 1995. This section of the Procedure Manual currently remains in effect. Exhibit 4 reiterates that Table 37 should not be used with Table 62 “because doing so will result in duplicate measurements and artificially high percentages of impairment.”

¹⁸ *See, e.g., William C. Pyron*, Docket No. 98-1625 (issued February 18, 2000); *Richard Cannarella*, Docket No. 98-501 (issued October 21, 1999); *Kimberly A. Chapelle*, Docket No. 97-1177 (issued December 24, 1998); *Maryellen Delasantro-Franklin*, Docket No. 97-490 (issued November 5, 1998); *Phyllis Powell-Hobgood*, Docket No. 96-2123 (issued July 22, 1998); *Michele R. Richardson*, Docket No. 95-2169 (issued June 14, 1997); *Marguerita B. Younger*, Docket No. 95-1892 (issued June 10, 1997).

percent, based on a finding that FECA Bulletins No. 95-17 and 96-17 did not allow combined use of the *Guides* Table 37 and Table 62. The hearing representative explained as follows:

“Dr. Weiss duly supplied the appropriate tables and page numbers from the A.M.A., *Guidelines*, as required to support his impairment rating.

“Upon his review, the DMA [District medical adviser] referred to the Office’s Federal Employees’ Compensation Act (FECA) Bulletin Number 96-17, issued on September 20, 1996, that addressed the computation of schedule awards using the fourth edition of the A.M.A., *Guides*. The bulletin specifically referred to table 62 in the A.M.A., *Guides* that specifically addressed impairments due to arthritis. Armed with the directives outlined in the FECA Bulletin, the DMA concluded the claimant’s impairment was only 13 percent.

“The claimant’s attorney argued that the DMA created a conflict by invoking the bulletin. However, I do not agree. FECA Bulletin 96-17 was issued to the District Offices to answer questions and clarify a previous bulletin (FECA Bulletin 95-17), that described the various differences between the fourth edition of the A.M.A., *Guides* and previous editions. The later bulletin directed that the list outlined in the FECA Bulletin 95-17 should be sent to examining physicians, along with a statement advising the doctors that the bulletin represent[s] OWCP policy in determining impairment. As such, the information contained in the bulletin supersedes the information provided in the A.M.A., *Guides* regarding the calculation of impairment, FECA Bulletin 95-17 specifically noted that A.M.A., *Guides* instructions were often not very clear, particularly with regard to the lower extremities and the discussion of arthritis. As a result, the impairments are calculated, using tables with overlapping applications, leading to impairment percentages that greatly exceed the actual degree of impairment. The bulletin listed the tables that were not compatible and that could not be used together. Table 62, page 83, was listed and shown note to be used to tables 36, 37, 38, and 39. As Dr. Weiss utilized the two tables together, his final assessment regarding the impairment in this case cannot be honored as valid.” (Emphasis in original.)

Since March 23, 1995 the Office, in the exercise of its discretion, has found that certain tables found in the fourth edition of the A.M.A., *Guides* would, if combined, result in duplication of impairment awards. In the exercise of its discretion, to achieve consistent results and to effectuate the policy of fair compensation of schedule impairments under the Act, the Director has limited dual use of certain tables of the A.M.A., *Guides*. In this case, as in numerous decisions since March 1995, the Office has explained why dual use of certain tables within the A.M.A., *Guides* would result in a duplicative award. The Board has previously upheld this policy and will again do so in this case.

Our dissenting colleague points out that the hearing representative failed to consider the application of the Office’s new regulation at section 10.404 and that promulgation of the new regulation supersedes existing Office policies concerning the determination of impairment under the fourth edition of the A.M.A., *Guides*. Section 10.404 provides that the Office will evaluate impairment for schedule award purposes under the specified editions of the A.M.A., *Guides*.

The majority finds that the new regulation merely codifies recognition of the A.M.A., *Guides*, in general, as a uniform standard for evaluating impairment. This is consistent with the Board's existing case law in this area and necessary to ensure equal justice for all claimants in the evaluation of permanent impairments and to provide consistent results for claimants similarly situated. Because the Board has affirmed the Office practice of delineating mutually exclusive tables since issuance of FECA Bulletin 95-17, the majority will not depart from a uniform standard in schedule award cases under the fourth edition of the A.M.A., *Guides*.

The December 2, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
October 2, 2001

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

Willie T.C. Thomas, Member, dissenting:

The issue before the Board in the instant appeal is whether the Office of Workers' Compensation Programs must apply the regulations applicable to this claim effective January 4, 1999 requiring the Office to utilize the American Medical Association, *Guides to the Evaluation of Permanent Impairment*¹ in calculating appellant's schedule award.

The regulation pertinent to this claim decided by the hearing representative, Jan R. Woods, on December 2, 1999 is found at section 10.404,² which reads as follows:

“Compensation is provided for specified periods of time for the permanent loss or loss of use of certain members, organs and functions of the body. Such loss or loss of use is known as permanent impairment. Compensation for proportionate

¹ (4th ed. 1994).

² 20 C.F.R. § 10.404. See Federal Register/Vol. 63. No 227/Wednesday, November 25, 1998/Rules and Regulations

periods of time is payable for partial loss or loss of use of each member, organ or function. OWCP evaluates the degree of permanent impairment to schedule members. Organs and functions as defined in 5 U.S.C. 8107 according to the standards set forth in the specified (by OWCP) edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*”

Appellant herein, Ronald Kraynak, submitted a six-page orthopedic report by Dr. David Weiss and requested payment of a schedule award for his right lower extremity permanent impairment. Dr. Weiss reported the following rating of appellant’s permanent impairment on the basis of the A.M.A., *Guides*:

“Right knee atrophy	13 percent	Table 37, page 77
“Right knee crepitation with patellofemoral pain	5 percent	Table 62, page 83
“Total combined right lower extremity	17 percent	

Dr. Weiss’ medical report was referred to an Office medical adviser to ascertain whether such report was consistent with the A.M.A., *Guides*. Upon review of Dr. Weiss’ report, the Office medical adviser, Dr. Daniel Kalash, referred to a September 20, 1996 FECA Bulletin 96-17.³ The foregoing bulletin references an attachment to FECA Bulletin 95-17⁴ that contains a list of impairment tables in Chapters 3 and 4 of the 4th edition of the A.M.A., *Guides*, which the attachment deemed incompatible and mutually exclusive. The instructions on the attachment note that “Tables listed in Column I should not be used in Column II because doing so will result in duplicate measurements and artificially high percentages of impairment.” No additional information as to the source of this attachment was disclosed. The authors of FECA Bulletins 95-17 and 96-17 were not disclosed. Nor were there any comments as to the reliability of the information contained in the attachment or whether the tables and measurements in the A.M.A., *Guides* were actually unreliable or any indication of the names of the researchers who reviewed the measurements and tables in Chapters 3 and 4 of the 4th edition of the A.M.A., *Guides* and found them lacking reliability.

The Office medical adviser did not evaluate Dr. Weiss’ report pursuant to the 4th edition of the A.M.A., *Guides* even though he ostensibly reviewed this report on January 13, 1999, after the effective date of the new regulation. In evaluating Dr. Weiss’ report, the Office medical adviser assumed the ministerial function of an OWCP employee and applied expired FECA Bulletin 96-17 and its expired counterpart 95-17 and determined that a schedule impairment utilizing the above bulletins yielded a 13 percent permanent impairment rather than the 17 percent permanent impairment determined by Dr. Weiss using the 4th edition of the A.M.A., *Guides*. Dr. Kalash stated:

“FECA Bulletin No. 96-17, Table 62 which addresses impairment due to arthritis may be used only if no other abnormality is present with the exception of joint fracture.”

³ FECA Bulletin No. 96-17. Expiration date was September 19, 1997.

⁴ FECA Bulletin No. 95-17 and attachments. Expiration date was March 22, 1996.

Dr. Kalash allowed only a 13 percent permanent impairment for leg muscle atrophy of the thigh citing Table 37 at page 77 of the *Guides*.

Hearing Representative Jan Woods did not consider that section 10.404, effective January 4, 1999, specifically provides that OWCP evaluates permanent impairment using the current specified edition of the A.M.A., *Guides*. Expired 1995 and 1996 FECA Bulletins and attachments that OWCP may have legitimately used prior to January 4, 1999, the effective date of the current regulation governing the decision of the hearing representative, were no longer valid and should not have been used to deny this appellant an appropriate and accurate adjudication of his schedule award claim under the fourth edition of the A.M.A., *Guides*

The hearing representative relied on the opinion of the Office medical adviser who applied expired FECA bulletins that had been superseded by the new regulations and did not request a review of Dr. Weiss' opinion based on the 4th edition of the A.M.A., *Guides*.

The hearing representative specifically held, "the information contained in the [expired] bulletins supersedes the information provided in the A.M.A., *Guides* regarding the calculation of impairment." I find such holding to be error since section 10.404 provides that OWCP evaluates permanent impairment using the current specified edition of the A.M.A., *Guides*. It is axiomatic that an expired bulletin may not supersede the rules of the Agency published in the Federal Register and the Code of Federal Regulations effective January 4, 1999.⁵

The only medical report of record that satisfies the criteria for a schedule award under the *Guides* is the report of Dr. Weiss. On both the dates this report was ostensibly evaluated by the Office medical adviser and the hearing representative, only the A.M.A., *Guides* could be used to evaluate appellant's permanent impairment. The attachment to FECA Bulletins 95-17 and 96-17 has never been a part of the 4th edition of the A.M.A., *Guides*.

The hearing representative erred in accepting the Office medical adviser's opinion in applying expired FECA Bulletins 95-17 and 96-17 in the instant claim in calculating appellant's schedule award. The hearing representative further erred in not applying section 10.404, effective January 4, 1999, as the applicable law governing this case.

In spite of the history associated with the A.M.A., *Guides* cited to by the majority, the new regulations are not simply a codification of Board's case law. The revised regulations specifically omitted certain sections of the old regulations such as abandonment of a hearing under section 8124 of the Act and added a provision regarding the time limit for requesting reconsideration at 20 C.F.R. § 10.607(c). The revised regulations also specifically included for the first time section 10.404 requiring the A.M.A., *Guides* to be used as the standard for evaluating schedule awards.

⁵ FECA Bulletin No. 01-05 issued January 29, 2001 provides that all claims examiners and hearing representatives should begin using the fifth edition of the A.M.A., *Guides* effective February 1, 2001. This bulletin does not contain a separate attachment of mutually exclusive tables that must be used in lieu of the applicable tables in the fifth edition of the A.M.A., *Guides*.

Discretion traditionally granted the Director does not permit him to ignore the current published rules of the Department of Labor at 20 C.F.R. section 10.404 effective January 4, 1999. The current regulation must apply to all claims adjudicated by OWCP. OWCP may not selectively apply specific sections of the revised regulations to certain claims. This alone leads to inconsistent results and unequal justice to appellants such as Mr. Kraynak.

For the foregoing reasons, I would reverse the decision of the hearing representative and grant appellant a schedule for a 17 percent permanent impairment of the right lower extremity based on the medical report of Dr. Weiss.

Because the majority holds that the new regulations are not controlling and need not be applied in the instant claim even though the adjudication of this claim occurred after the effective date of January 4, 1999, and because the majority will continue to permit OWCP to apply expired as well as superseded FECA Bulletin 95-17 with its attachment amending, but not a part of the 4th edition of the A.M.A., *Guides*, I feel compelled to record this dissent.

Willie T.C. Thomas
Member