

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETER COSTELLO and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION EARLE, Colts Neck, NJ

*Docket No. 01-503; Submitted on the Record;
Issued October 9, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has a permanent impairment to his left lower extremity such that he would be entitled to a schedule award under section 8107 of the Federal Employees' Compensation Act.

On November 12, 1980 appellant, then a 38-year-old warehouseman/freight worker indicated that he sustained contusions to the left knee when he jumped out of the way of a lift, which was backing up in the course of his employment. The Office of Workers' Compensation Programs accepted appellant's claim for an incomplete tear of the lateral collateral ligament of the left knee and left knee contusion. Appellant received appropriate compensation and returned to limited duties on February 9, 1981 and regular duty on March 17, 1981.¹

In a March 4, 1996 letter, appellant's representative indicated that he was in the process of investigating appellant's right to receive a schedule award.

In an August 13, 1997 letter, appellant's representative enclosed a copy of his previous letters to the Office and a November 8, 1996 report from Dr. Ronald John Potash, a Board-certified surgeon. In his report, Dr. Potash noted appellant's history of injury and treatment. He also noted appellant's subsequent injuries that included a fracture of the left elbow at an agency sponsored picnic in a "dunking booth" on July 30, 1982 and a sprained left ankle/foot in the parking lot on August 9, 1988. Additionally, Dr. Potash indicated that appellant stepped on a slagstone at work on June 10, 1992 and twisted his right ankle and also suffered several twisting

¹ The record reflects that appellant received a seven percent schedule award to his right leg from October 21, 1996 to March 11, 1997. The record reflects that appellant sustained a left elbow fracture in July of 1982 and a sprain to the left ankle/foot on August 9, 1988. In addition, it appears that appellant sustained a right ankle ossification of the deltoid ligament on June 10, 1992 and an avulsion fracture at the tip of the lateral malleolus on the left ankle on July 31, 1992. With the exception of the schedule award to the right foot, the record does not reflect that any of these subsequent injuries were filed as claims or accepted as work related.

injuries to his left ankle on July 31, 1992 while at work and delivering mail. He stated that appellant's several work-related injuries were the competent producing factors of the subjective and objective findings. Dr. Potash indicated that he utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*,) 4th edition and stated the following:

“For loss of range of motion of left knee² 10 percent

“For strength loss of left quadriceps muscle (4/5)³ 12 percent

“For loss of range of motion of left ankle (dorsiflexion)⁴ 7 percent

“For loss of range of motion right ankle (dorsiflexion)⁵ 7 percent

“Total impairment to left lower extremity 27 percent

“10 percent x 12 percent = 21 percent⁶

“21 percent x 7 percent = 27 percent

“Total impairment to right lower extremity 7 percent

“For loss of range of motion of left elbow⁷ 2 percent

“Total impairment of left upper extremity

“1 percent x 1 percent = 2 percent⁸

“Therefore, from this examiner's viewpoint, this patient reached maximum medical improvement on October 21, 1996.”

In a March 6, 1998 report, an Office medical adviser Dr. Daniel Kalash, reviewed the November 8, 1996 report of Dr. Potash and calculated the percentage of impairment of the left leg. He indicated that according to Table 41 (page 78) of the A.M.A., *Guides*, 4th edition, appellant had flexion of 100 degrees resulting in a 10 percent impairment. Dr. Kalash indicated that according to Table 39 (page 77) of the A.M.A., *Guides*, appellant had a 4/5 muscle strength

² Table 41, page 78.

³ Table 39, page 77.

⁴ Table 42, page 78.

⁵ Table 42, page 78.

⁶ Combine Value Chart page 322.

⁷ Figure 32, page 40; Figure 35, page 41.

⁸ Combined Value Chart page 322.

weakness, which equaled 12 percent impairment. This combined to a total of 22 percent. He further utilized the combined values chart on Page 322 and multiplied the two previous percentages and determined that appellant had 21 percent impairment to the left knee. Dr. Kalash indicated that appellant's date of maximum medical improvement was October 21, 1996.

In a March 6, 1998 letter to appellant's representative, the Office indicated that appellant was entitled to a schedule award, however, it could not be processed without a Form CA-7. The Office advised appellant's representative that upon receipt of the proper form, further action would be taken to process the claim for a schedule award.

In a September 9, 1998 memorandum, the Office requested clarification from the Office medical adviser regarding the connection between appellant's condition at the time of his examination and the initial injury of November 12, 1980.

In an undated response, the Office medical adviser indicated that the medical narrative of Dr. Potash dated September 8, 1996,⁹ had no connection to the injury of November 12, 1980. He indicated that the left knee arthrogram indicated no abnormalities. Dr. Potash indicated that appellant was treated conservatively and returned to limited duty on February 9, 1981 and regular duties on March 17, 1981.

By letter dated September 28, 1998, appellant was advised that a second opinion examination was scheduled with Dr. Irving D. Strouse, a Board-certified orthopedic surgeon.

In a November 28, 1998 report, Dr. Strouse noted appellant's history of injury and treatment. He diagnosed a postpartial tear, lateral collateral ligament of the left knee. Dr. Strouse further opined that appellant made a complete recovery from the injury and when he returned to work, functioned well and apparently did well without any sequelae. He observed that any further injuries that occurred to appellant were unrelated to his knee injury. In particular, Dr. Strouse noted that an injury to his left and right ankle were unrelated to the knee injury of November 12, 1980 as they were separate new injuries. He further opined that appellant was not entitled to any schedule award since his disability was zero. Dr. Strouse stated that his examination revealed that appellant's left knee condition was fully resolved. He elaborated by stating that the left knee arthrogram performed in 1980, showed no evidence of cartilage tear and would be compatible with a partial lateral collateral ligament injury. Dr. Strouse indicated that the arthrogram performed at that time was only useful in diagnosing meniscal injuries, such as meniscal tears. He indicated that this patient had no meniscal tears and, therefore, the arthrogram was negative, but even with a "partial lateral collateral ligament injury, an arthrogram would still be negative." Dr. Strouse indicated that appellant's prognosis concerning his injury of November of 1982¹⁰ of his left knee is excellent with no need for a schedule award to his left knee.

⁹ The record reflects that Dr. Potash's report is dated November 8, 1996.

¹⁰ The record reflects that appellant's injury occurred on November 12, 1980. This reference to 1982 appears to be a typographical error, as Dr. Strouse referred to the proper date of injury in the initial portion of his report.

By letter dated January 21, 1999, the Office advised appellant that a conflict had arisen and he was being referred for an independent medical examination.

In a February 22, 1999 report, Dr. Michael J. Cunningham, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment. Dr. Cunningham stated that since the time of the original injury, appellant has not had any new injuries to the same knee. He found that appellant continued to experience left knee pain, which was felt mainly on the anterior aspect. Dr. Cunningham stated that appellant did not experience any of this discomfort prior to the original injury. He indicated that appellant had certain times with no pain and some curtailment of certain activities such as bowling, baseball and softball. Dr. Cunningham stated that the physical examination revealed the left knee to be with a full range of motion from full extension, *i.e.*, 0 degrees to 150 degrees of extension. He stated there was no effusion, negative varus or valgus stress laxity. Dr. Cunningham also indicated that there was negative Lachman's, negative anterior draw, negative pivot shift, negative posterior draw and negative medial or lateral McMurray's. He indicated that there is no significant tenderness to palpation along the joint lines or to patella compression, patella mobility is normal, there is no crepitation and no atrophy. Dr. Cunningham also indicated that the thigh circumference measured 10 cm above the patella is bilaterally at 40 cm, with a grade 5/5 motor strength in both knees flexion and knee extension and the gait had a normal appearance. He diagnosed lateral collateral ligament sprain to the left knee, which was resolved and the date of maximum medical improvement occurred within one year of the injury. Dr. Cunningham further opined that there was no objective impairment of this extremity as the examination did not reveal any evidence of residual lateral collateral ligament laxity. He noted that the examination of the knee was normal. Dr. Cunningham further opined that a strict impairment rating could not be assigned as appellant did not have any objective findings of left knee abnormality. He explained that the sole findings were complaints of interference of his activities of daily living as described above in association with minimal intermittent pain. Dr. Cunningham opined that an impairment rating could not be assigned since there were no objective findings on physical examination.

By decision dated February 14, 2000, the Office denied appellant's claim for a schedule award on the grounds that the evidence did not establish that he had a ratable impairment to his left lower extremity. The Office found that Dr. Cunningham had provided an impartial medical examination and concluded that appellant had no impairment in his left lower extremity.

In a February 23, 2000 letter, appellant requested a hearing.

In a decision dated August 28, 2000, an Office hearing representative affirmed the February 14, 2000 decision.

The Board finds that appellant has not established that he has a permanent impairment of his left lower extremity such that he would be entitled to a schedule award under section 8107 of the Act.

An employee seeking compensation under the Act¹¹ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,¹²

¹¹ 5 U.S.C. §§ 8101-8193.

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.¹³

Section 8107 of the Act provides that, if there is permanent disability involving the loss or 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.¹⁴ 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 Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office as a standard for evaluating schedule losses and the Board has concurred in such adoption.¹⁵

In order to meet his burden, appellant must submit sufficient medical evidence to show a permanent impairment causally related to employment that is ratable under the A.M.A., *Guides*. The Office's procedures discuss the type of evidence required to support a schedule award. The evidence must show that the impairment has reached a permanent and fixed state and indicate the date this occurred, describe the impairment in detail and contain an evaluation of the impairment under the A.M.A., *Guides*.¹⁶

In the present case, the evidence does not establish that appellant sustained a permanent impairment causally related to the employment injury.

In this case, there was a conflict in opinion between Dr. Potash, appellant's physician, who found 27 percent impairment to the left lower extremity and Dr. Strouse, the second opinion physician who found that appellant had no impairment as he had made a complete recovery from his November 12, 1980 employment injury and that any further injuries were unrelated to his knee injury. Due to this conflict, the Office properly referred appellant to Dr. Cunningham for an independent examination and evaluation of appellant's impairment. He followed a thorough examination, determined that there was no objective evidence of any impairment to the left knee and the date of maximum medical improvement occurred within one year of the injury.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist if sufficiently well rationalized and based upon a proper and factual medical background must be given special weight.¹⁷ The Board finds that the weight

¹² *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

¹³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

¹⁴ 5 U.S.C. § 8107(a).

¹⁵ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5 (March 1995).

¹⁷ *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

of the medical evidence is represented by the thorough report of Dr. Cunningham, who was selected to resolve the conflict of opinions, whose findings, when properly applied to the A.M.A., *Guides*, establish that appellant had no objective evidence of any impairment.

Appellant has not provided any probative medical evidence that he is entitled to a schedule award under section 8107 of the Act.

The August 28 and February 14, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
October 9, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member