

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL MALOOF and U.S. POSTAL SERVICE,
POST OFFICE, Montvale, NJ

*Docket No. 02-1047; Submitted on the Record;
Issued December 20, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than five percent impairment of his lower extremities; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On June 6, 1999 appellant, then a 38-year-old letter carrier, filed a claim for a recurrence of disability beginning April 8, 1999.¹ The date of the original injury was listed as December 19, 1995. Appellant indicated that he had been working light duty but experienced increased pain in his left calf muscle due to walking.

A magnetic resonance imaging (MRI) scan performed on May 4, 1999 of the left knee showed early changes of chondromalacia.

In a September 22, 1999 report, Dr. Ira Esformes, a Board-certified orthopedic surgeon, noted that appellant suffered from disabilities with both his right and left knees secondary to a work injury to the right leg, calf muscle sustained in 1995. He noted that appellant had decompensated and was having difficulty sitting or driving his motor vehicle and climbing up and down stairs. Dr. Esformes recommended surgery of both knees. He diagnosed "retropatellar stress, chondromalacia patellofemoral joint, osteochondral defect of the lateral femoral condyle, chronic gastro soleus bursitis, s/p tera with cyst."

On December 9, 1999 the Office accepted appellant's claim for a recurrence of disability based on bilateral chondromalacia patella. Surgery was authorized for both knees.

Appellant underwent surgery of both knees on January 13, 2000 including arthroscopy and chondroplasty of the patellofemoral joint.

¹ The Board notes that the record before us does not contain a copy of appellant's original claim.

In a report dated April 3, 2001, Dr. Esformes noted that appellant had atrophy of his right leg compared to the left leg “where there is close to 2.5 centimeters (cm) of atrophy present.” He estimated appellant’s permanent impairment under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) to be three percent of the left knee and ten percent of the right knee.

On April 16, 2001 appellant filed a claim for a schedule award.

In a report dated September 4, 2001, Dr. Esformes indicated that appellant had evidence of a chondral fracture of the left patella and a had undergone a lateral release of the right patella with shaving chondroplasty of both knee joints and patellofemoral joint pain. He stated that appellant had evidence of ten percent disability on the right knee and three percent impairment of the whole person.

In a report dated October 2, 2001, Dr. Esformes noted on physical examination that appellant showed evidence of crepitus and grinding during range of motion testing, but no decrease of strength and unrestricted range of motion. He stated, “[appellant] does have evidence of atrophy. There is 2.5 cm of atrophy present in the kneecaps, approximately 6 cm above the level of the patella. This is equal on both sides. There is no evidence of calf atrophy present.” Dr. Esformes further stated as follows:

“[Appellant] had surgery which consisted of a lateral release and a shaving chondroplasty of the patella. According to the [A.M.A., *Guides*] on Table 37, page 77, in the [fourth edition] as well as Table 17-6 on page 530 in the [fifth edition], one can clearly see that when there is atrophy of greater than 2 [to] 2.9 cm this is called a moderate degree of impairment, therefore[,] whole person is 3 [to] 4 [percent] and the lower extremity impairment is between 3 and 13 [percent].”

The district medical adviser, Dr. Henry Megliato, reviewed Dr. Esformes’ report and disagreed with his estimates of impairment. He calculated that appellant had five percent impairment based on the diagnosis of chondromalacia and the physical findings of crepitus. Dr. Megliato noted that since appellant had undergone surgery it was expected that some of the cartilage would be lost due to the chondroplasty. He specifically noted that he did not accept Dr. Esformes’ finding of atrophy since he was unable to determine if the 2.5 cm atrophy was indeed atrophy or a normal circumference since Dr. Esformes had reported that the thigh measurements were equal on both sides and there was no loss of strength.

In a November 20, 2001 decision, the Office issued a schedule award for a five percent impairment of both lower extremities.

By letter received by the Office on December 11, 2001, appellant request reconsideration. He submitted a December 4, 2001 report from Dr. Esformes, who referenced his notes, stating that they clearly outlined that “the 2.5 cm shows more on the right than the left. The atrophy is of the right leg. It is smaller than the left leg by one inch.”

In a December 28, 2001 decision, the Office denied appellant’s request for reconsideration on the merits.

The Board finds that this case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act² and its implementing federal regulation,³ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use of specified members, functions or organs of the body. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss shall be determined. 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. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁵

In this case, appellant is seeking a schedule award for impairment to the lower extremities based on his accepted claim of bilateral chondromalacia. Appellant submitted a medical report from Dr. Esformes, finding that he had atrophy of the right and left leg of 2.5 cm. Dr. Esformes opined that appellant's impairment was between 3 and 13 percent impairment under the fourth edition of the A.M.A., *Guides* at Table 37, page 77 or Table 17-6, page 530 of the fifth edition.

The Board notes that the fifth edition of the A.M.A., *Guides* is applicable in this case. On January 29, 2001 the Office announced that, effective February 1, 2001, all claims examiners and hearing representatives should begin utilizing the fifth edition of the A.M.A., *Guides*.⁶

Although Dr. Esformes mentioned the fifth edition of the A.M.A., *Guides*, his impairment calculation was not specific as to the exact amount of impairment for each leg. The Office, therefore, sent a copy of Dr. Esformes' report to an Office medical adviser for review. The Office medical adviser rejected the physical findings of atrophy identified by Dr. Esformes and stated that appellant had 5 percent impairment of "the extremities" based on the diagnoses of chondromalacia.⁷

The Board considers the report of the Office medical adviser to be deficient in that he does not specifically reference the A.M.A., *Guides* in calculating appellant's permanent impairment of the extremities as 5 percent impairment. Without referencing page, chart or figure

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999).

⁴ 5 U.S.C. § 8107(c)(19).

⁵ See 20 C.F.R. § 10.404 (1999).

⁶ The action was in accordance with the authority granted the Office under 20 C.F.R. § 10.404 (1999).

⁷ Dr. Esformes did not follow the directions set forth in the fifth edition of the A.M.A., *Guides* for properly measuring for atrophy of the thigh. In the fifth edition of the A.M.A., *Guides* the physician is directed at Table 17-6, page 530 to measure the thigh circumference "10 cm above the patella with the knee fully extended and the muscles relaxed." Dr. Esformes, however, performed measurements only 6 cm above the patella.

numbers of the fifth edition of the A.M.A., *Guides*, the Board is unable to determine the propriety of appellant's schedule award.

Given the deficiencies of Dr. Esformes' report and the Office medical adviser's opinion, the Board will remand the case to obtain a second opinion evaluation with a Board-certified medical specialist in order to properly calculate appellant's degree of permanent impairment due to the accepted condition of bilateral chondromalacia. After such further medical development as the Office deems necessary, the Office shall issue a *de novo* decision with respect to the schedule award.

Inasmuch as the Board finds the Office's November 20, 2001 decision to be in error, the Board considers the Office's December 28, 2001 decision to be moot.

The decisions of the Office of Workers' Compensation Programs dated December 28 and November 20, 2001 are hereby vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
December 20, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member