

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. SMITH and DEPARTMENT OF LABOR, MINE
SAFETY & HEALTH ADMINISTRATION, Mount Gay, WV

*Docket No. 00-419; Submitted on the Record;
Issued January 16, 2002*

DECISION and ORDER

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

The issue is whether appellant has more than a 10 percent permanent impairment of the right lower extremity, for which he received a schedule award.

On February 2, 1995 appellant, a 44-year-old mine inspector, injured his right knee when he slipped and struck his knee on a shuttle car he was inspecting. He filed a claim for compensation benefits on February 3, 1995, which the Office of Workers' Compensation Programs accepted on May 4, 1995 for medial meniscus tear of the right knee. Appellant underwent a partial lateral meniscectomy on his right knee on May 11, 1995.

Appellant underwent a partial medial meniscectomy on his right knee on July 25, 1997.

In a report and impairment evaluation dated November 11, 1997, Dr. Henry M. Hills, a Board-certified orthopedic surgeon, calculated that appellant had a seven percent impairment of the right leg pursuant to the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. Dr. Hills stated:

“As regards to the right knee, he has relatively good motion and strength. For the first surgical procedure of a partial medial meniscectomy, this is a one percent impairment according to Table 64 [page 85]. The second procedure of a meniscectomy and clean up of the joint is a four percent impairment also according to Table 64. He also has patellafemoral arthrosis, which is a two percent impairment according to Table 62 [page 83]. This all adds up to seven percent permanent impairment for the right knee.”

On December 1, 1997 appellant filed a Form CA-7, claim for a schedule award, based on partial loss of use of his left lower extremity.

In an impairment rating work sheet/report dated April 23, 1998, an Office medical adviser, Dr. Daniel Zimmerman, found that appellant had a seven percent impairment to the right

lower extremity, although he partially modified Dr. Hills' calculations. The Office medical adviser noted that Dr. Hills had utilized Tables 62 and 64 in rendering his conclusions. He found that appellant had a two percent impairment rating resulting from his 1997 partial medial meniscectomy, pursuant to Table 64 and a five percent impairment rating due to patellafemoral arthrosis, pursuant to Table 62. Using the Combined Values Chart at pages 322-24 of the A.M.A., *Guides*, the Office medical adviser found that five percent combined with a two percent rating yielded a seven percent impairment of the right lower extremity under the schedule. Dr. Hills further found that this rating conformed to assessment parameters set forth in Office FECA Bulletin No. 95-17 and that his modification was required by Office FECA Bulletin No. 96-17.

By decision dated September 1, 1998, the Office granted appellant a schedule award based on a seven percent permanent impairment of the right lower extremity for the period November 21, 1997 to April 11, 1998, for a total of 20.16 weeks of compensation.

By letter dated September 22, 1998, appellant's attorney requested a hearing, which was held on June 16, 1999.

By decision dated August 5, 1999, an Office hearing representative modified the Office's September 1, 1998 decision, awarding appellant an additional 3 percent impairment for a total of 10 percent permanent impairment of his right lower extremity. The hearing representative noted that Table 64 of the A.M.A., *Guides* indicated that having a partial medial and lateral meniscectomy, as appellant did, correlated to a 10 percent permanent impairment of the lower extremity. The hearing representative then found that Table 62, which addresses impairment due to arthritis, may only be used if no other abnormality is present, with the exception of joint fractures, citing Office FECA Bulletin No. 96-17. The hearing representative, therefore, concluded that both Drs. Hills and Zimmerman incorrectly applied the A.M.A., *Guides*, in giving appellant a five percent impairment of the leg under Table 62, after having already used Table 64.

In his appeal to the Board, appellant's attorney contends that appellant is entitled to an award greater than the 10 percent impairment rating of the right lower extremity granted by the Office hearing representative in his August 5, 1999 decision. Appellant's attorney argues that the hearing representative's summary reliance on Office FECA Bulletin No. 96-17 was erroneous and asserts that impairments that can be calculated using two or more tables under the A.M.A., *Guides* have been taken into consideration by the A.M.A., *Guides*. He specifically contends that appellant is entitled to an additional award of five percent impairment based on patellafemoral arthrosis.

The Board finds that appellant has not established that he has more than a 10 percent permanent impairment of the right lower extremity.

The schedule award provision of the Act¹ and its implementing regulation² set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. 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 table so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.³

In *Ronald R. Kraynak*,⁴ however, the Board reiterated the principle that the use of the A.M.A., *Guides* has never 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. The Board noted that in situations where 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.⁵ In this case, the Office hearing representative properly relied on the medical evidence of record in exercising its discretion.

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 No. 95-17 was subsequently reiterated in FECA Bulletin No. 96-17

¹ 5 U.S.C. § 8107. 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).

² 20 C.F.R. § 10.404 (1999).

³ *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 series of JAMA *Guides*.

⁴ *Ronald R. Kraynak*, 53 ECAB ____ (Docket No. 00-1541, issued October 2, 2001) (Thomas, W.T.C., dissenting).

⁵ *Id*; see *August M. Buffa*, 12 ECAB 324 (1985).

and incorporated in the FECA Procedure Manual at section 3.700, exhibit 4 in October 1995.⁶ Subsequent review by the Board has upheld the Director's exercise of discretion in this interpretation of the A.M.A., *Guides*, fourth edition.⁷

In this case, although appellant seeks an additional award of five percent impairment based on Dr. Hills' diagnosis of patellafemoral arthrosis, the Office hearing representative limited appellant's schedule award to ten percent, based on a finding that both Drs. Hills and Zimmerman incorrectly applied the A.M.A., *Guides*, in giving appellant a five percent impairment of the leg under Table 62, after having already used Table 64. The hearing representative, citing Office FECA Bulletin No. 96-17, determined that Table 62, which addresses impairment due to arthritis, may only be used if no other abnormality is present, with the exception of joint fractures. The hearing representative, therefore, found that FECA Bulletin No. 96-17 did not allow combined use of the A.M.A., *Guides* Table 62 and Table 64. The hearing representative explained as follows:

"In this case, [Dr. Zimmerman] noted that the operative report of July 25, 1997 confirmed that [appellant] underwent a partial medial meniscectomy and also indicated that the lateral meniscus was intact. Therefore, Dr. Zimmerman concluded, the claimant was entitled only to a [two percent] impairment of the lower extremity on the basis of the partial medial meniscectomy.

"However, a report now in the file confirms that [appellant] did undergo a partial lateral meniscectomy on May 11, 1995. It appears that the operative report for May 11, 1995 (along with other documents from that time period) was not in the file when it was reviewed by Dr. Zimmerman. Table 64 in the [A.M.A., *Guides*,] clearly indicates that having a partial medial and lateral meniscectomy correlates to a 10 [percent] permanent impairment of the lower extremity.

The hearing representative then noted that both Drs. Hills and Zimmerman concluded that appellant had a five percent permanent impairment of the right leg for patellafemoral arthrosis using Table 62 of the A.M.A., *Guides*. Citing FECA Bulletin No. 96-17, the hearing representative noted that Table 62 could only be used in situations where no other abnormality was present, with the exception of joint fractures. He concluded:

"Therefore, both Dr. Hills and Dr. Zimmerman incorrectly applied [the A.M.A., *Guides*] in giving the claimant a five percent impairment of the leg under Table 62 after having already given him a percentage using Table 64. The appropriate application of [the A.M.A., *Guides*], as applied to the clinical findings reported by

⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, exhibit 4 (October 1995). 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."

⁷ See Ronald R. Kraynak, *supra* note 4.

the examining physician, results in the finding that [appellant] had a permanent impairment in his right leg of 10 percent.”

The hearing representative properly determined that Table 62 at page 83, with specific regard to a finding based on patellafemoral arthrosis, cannot be used in combination with Table 64 at page 85, when Table 64 had already been considered in deriving impairment ratings based on a partial medial and lateral meniscectomy. Table 64 of the A.M.A., *Guides* provides that having a partial medial and lateral meniscectomy correlates to a 10 percent permanent impairment of the lower extremity.

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, the Office has explained why dual use of certain tables within the A.M.A., *Guides* would result in a duplicative award.

The decision of the Office of Workers’ Compensation Programs dated August 5, 1999 is hereby affirmed.

Dated, Washington, DC
January 16, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member