

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL VINING (claiming as administrator of the estate of KEVIN M. VINING) and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 02-1508; Submitted on the Record;  
Issued June 20, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

The issue is whether appellant is entitled to a posthumous schedule award for greater than 26 percent permanent impairment of the employee's left lower extremity.

This case was previously before the Board and the Board's prior decision is incorporated by reference herein.<sup>1</sup> The case was remanded by the Board in order for an Office medical adviser to calculate the degree of permanent impairment present in the employee's left leg at the time of his examination with Dr. James D'Amore on August 18, 1995. The Office medical adviser was to consider the physical findings of Dr. D'Amore in his calculation of a posthumous schedule award.

On remand, the Office referred the medical record to an Office medical adviser who prepared a report on August 23, 2000 using the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). The Office medical adviser initially noted that Dr. D'Amore's finding of 60 to 70 percent impairment was not supported by the A.M.A., *Guides*. He stated, "Dr. D'Amore cites decreased strength in the left leg with atrophic changes in quadriceps musculature but gives neither strength grade (Tables 38 & 39) or measurements (Table 37)." The Office medical adviser noted that he chose to attribute loss of range of motion to muscle weakness in order to avoid duplication of the award. He opined that the employee had a 20 percent permanent impairment for decreased range-of-motion findings of 60 to 70 degrees, a moderate impairment, under Table 41, page 78. He found two percent impairment based on the diagnosis of a partial meniscectomy at Table 64, page 85. He further found five percent impairment based on crepitation (including pain) at Table 62,

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<sup>1</sup> *Michael Vining (Kevin M. Vining)*, Docket No. 98-790 (issued April 25, 2001). The Board had first issued a decision on July 19, 2000 but pursuant to a petition for reconsideration by the Office of Workers' Compensation Programs, that decision was nullified and the April 25, 2001 decision was issued.

page 83. Using the Combined Values Chart, he calculated the employee's total percent of impairment as 26 percent.

On June 5, 2001 the Office issued a schedule award for an additional 11 percent impairment of the left leg, for a total award of 26 percent impairment.<sup>2</sup> The period of the award was listed as July 29, 1996 to March 7, 1997.

On June 6, 2001 appellant requested a hearing, which was held on November 14, 2001.

Appellant submitted an October 20, 2000 report from Dr. David Weiss, a Board-certified orthopedist. Dr. Weiss reviewed the medical records and listed the diagnoses as: (1) internal derangement of the left knee; (2) status post tear of the medial meniscus with partial medial meniscectomy in 1986; (3) recurrent tear of the posterior horn of the medial meniscus; and (4) degenerative joint disease. He rated the employee's impairment in accordance with the fourth edition of the A.M.A., *Guides*. The range-of-motion deficit for the left knee was listed as 20 percent according to Table 41, page 78. He also noted that there was 2.5 motor strength deficit left knee extension that equaled 25 percent impairment under Table 39, page 77. Dr. Weiss stated that the employee needed to wear metallic subsidized brace to maintain stability while walking and could not extend the left leg fully, secondary to quadriceps atrophy. He concluded that the total combined left lower extremity impairment was 40 percent.

In a report dated January 11, 2002, Dr. Neven A. Popovic, an Office medical adviser, indicated that he had reviewed the reports by Dr. D'Amore and Dr. Weiss. He reported that objective physical findings by Dr. D'Amore included decreased range of motion of the left knee, which according to Table 17-10, page 537 of the fifth edition of the A.M.A, *Guides* represented a 20 percent permanent impairment to the left lower extremity. He opined that no additional award could be given for apparent decreased muscle strength or muscle atrophy, as the alleged loss of strength had not been graded by Dr. D'Amore and the physician had not taken measurements for muscle atrophy. He further noted that, since the employee's decreased range-of-motion findings could be attributable to muscle weakness associated with loss of muscle mass, then it would not be appropriate to consider both factors in the rating as it would result in a duplication of the schedule award. Dr. Popovic advised that, since Dr. Weiss had not provided his own physical findings, his report did not provide any additional information upon which to base an increase in the impairment rating.

In a decision dated February 1, 2002, an Office hearing representative affirmed the Office's June 5, 2001 schedule award decision.<sup>3</sup>

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<sup>2</sup> The Office had previously issued a schedule award for 15 percent impairment on September 19, 1989. The Office increased the amount of the award to 26 percent on September 6, 2000, but this decision was rendered null and void by the Board, for lack over jurisdiction of the claim, at the time the decision was issued. *See Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>3</sup> The Office medical adviser indicated that Dr. Popovic's opinion had been obtained to ascertain whether or not Dr. Weiss' finding of 25 percent impairment due to "2.5 motor strength" should be given additional consideration. Dr. Popovic correctly noted that Dr. Weiss did not identify physical findings to support his estimate of 25 percent impairment for loss of motor strength; therefore, his opinion was insufficient to support an additional award beyond the 26 percent impairment already granted.

The Board finds that appellant is not entitled to a posthumous schedule award for greater than a 26 percent permanent impairment of the left lower extremity.<sup>4</sup>

The schedule award provisions of the Federal Employees' Compensation Act<sup>5</sup> and its implementing federal regulation,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

In this case, the Office properly followed the Board's instruction to have the August 18, 1995 report from Dr. D'Amore reviewed by an Office medical adviser.<sup>9</sup> In a report dated August 23, 2000, the Office medical adviser correctly applied Dr. D'Amore's physical findings pertaining to range of motion, crepitation and a diagnosis of partial meniscectomy to the A.M.A., *Guides*. He determined that the deceased employee had 26 percent impairment of the left lower extremity. Because the Office medical adviser's August 23, 2000 report constitutes the only rationalized medical opinion of record complete with impairment ratings based on physical findings compared to the A.M.A., *Guides*, it represents the weight of medical evidence.<sup>10</sup>

Although appellant submitted a report from Dr. Weiss finding a total of 40 percent impairment, Dr. Weiss opinion is not sufficiently reasoned to create a conflict in the record. The Office sent a copy of Dr. Weiss' October 20, 2000 report to another Office medical adviser, Dr. Popovic, to ascertain whether or not Dr. Weiss' finding of a 25 percent impairment due to "2.5 motor strength" should be given additional consideration. Dr. Popovic noted that Dr. Weiss did not identify any physical findings to support his estimate of 25 percent impairment for loss of motor strength; therefore, his opinion was insufficient to support an additional award beyond the 26 percent impairment already granted. The Board finds that Dr. Weiss' opinion is of

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<sup>4</sup> The Board has considered this claim in accordance with the fifth edition of the A.M.A., *Guides*, which became effective February 1, 2001.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> 20 C.F.R. § 10.404 (1999).

<sup>7</sup> 5 U.S.C. § 8107(c)(19).

<sup>8</sup> See 20 C.F.R. § 10.404 (1999).

<sup>9</sup> It is appropriate for an Office medical adviser to review the clinical findings of an attending physician and determine permanent impairment. See generally *Charles A. Sciulli*, 50 ECAB 488 (1999).

<sup>10</sup> A medical opinion regarding permanent impairment must be based on the A.M.A., *Guides*; see *Carolyn E. Sellers*, 50 ECAB 393 (1999).

diminished probative value since the physician failed to cite to specific physical findings in the record to support his permanent impairment rating.<sup>11</sup>

The decision of the Office of Workers' Compensation Programs dated February 1, 2002 is hereby affirmed.

Dated, Washington, DC  
June 20, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

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<sup>11</sup> The Board has held that a medical opinion not fortified by medical rationale is of little probative value. *Annie L. Billingsley*, 50 ECAB 210 (1998).