

It authorized a left total knee arthroplasty, which appellant underwent on September 1, 2000 and a motorized wheelchair. Appellant has preexisting poliomyelitis involving the right lower extremity. He retired from the employing establishment in March 2005.²

On October 14, 2002 appellant claimed a schedule award. The Office referred him to Dr. Alvin M. Kanter, a Board-certified orthopedic surgeon, to determine the extent of his impairment. On December 9, 2002 Dr. Kanter advised that appellant's disability was significantly increased by the polio residual on the right in conjunction with the left total knee arthroplasty. Under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*), he opined that appellant had 37 percent left leg impairment due to the work-related condition. Dr. Kanter also opined that appellant had 65 to 70 percent impairment in each leg due to both polio and the work injury. On January 20, 2003 an Office medical adviser opined that he had 37 percent left leg impairment based on a good result following total knee replacement.

In a July 24, 2003 decision, the Office issued a schedule award for 37 percent permanent impairment of the left leg. In an October 18, 2004 decision, an Office hearing representative directed that the Office obtain a supplemental report from Dr. Kanter on the extent of impairment stemming from appellant's preexisting condition. In a December 6, 2004 report, Dr. Kanter opined that appellant had 65 percent impairment of the left leg due to over compensating for his severely disabled right leg. On May 23, 2005 an Office medical adviser opined that the left knee was holding up quite well despite appellant's significant right leg impairment due to polio. He reiterated that appellant had 37 percent left leg impairment and there were no objective criteria to increase the schedule award.

In an August 16, 2005 decision, the Office denied the claim for an increased schedule award. By decision dated July 10, 2006, an Office hearing representative set aside the August 16, 2005 decision and directed that the Office medical adviser clarify his opinion with regards to Dr. Kanter's finding of 65 percent impairment.³ On August 7, 2006 the Office medical adviser stated that Dr. Kanter did not provide any objective findings to support deterioration in appellant's left leg or additional impairment. The Office found a medical conflict between Dr. Kanter, the second opinion physician, and the Office medical adviser, and referred appellant to Dr. Paul D. Belich, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In an October 10, 2006 report, Dr. Belich concurred with the Office medical adviser that appellant had 37 percent impairment to the left lower extremity based on the fifth edition of the A.M.A., *Guides*.

In an October 30, 2006 decision, the Office denied appellant's claim for an additional schedule award based on Dr. Belich's report. On March 1, 2007 an Office hearing representative

² Appellant was totally disabled due to his left knee condition from June 14, 1999 until March 28, 2002, when he accepted a modified distribution clerk position. By decision dated July 18, 2002, the Office found the modified distribution clerk position, which he began on April 22, 2002, fairly and reasonably represented his wage-earning capacity. Appellant's wage-loss benefits were terminated as his actual wages met or exceeded the wages of the job held when he was injured and, thus, no loss of wages occurred.

³ The Board notes the decision of June 29, 2005 is nonexistent. The hearing representative is referring to its prior decision of August 16, 2005.

set aside the October 30, 2006 decision and requested that the Office obtain a supplemental report from Dr. Belich clarifying how he used the A.M.A., *Guides*. In a May 4, 2007 report, Dr. Belich discussed how he arrived at his rating of impairment.

In a June 7, 2007 decision, the Office denied appellant's claim for an additional schedule award. On January 11, 2008 an Office hearing representative set aside the June 7, 2007 decision finding that Dr. Belich did not resolve the conflict in the medical opinion. The case was remanded for the Office to obtain a new impartial medical examination.

The Office referred appellant to Dr. Kevin F. Walsh, a Board-certified orthopedic surgeon, as the second impartial medical specialist. In a May 14, 2008 report, Dr. Walsh reviewed the history of injury, the statement of accepted facts and the medical evidence of record. He set forth his findings and concluded that appellant had a good result from the left total knee replacement and therefore he had 37 percent impairment to the left leg. Dr. Walsh discussed why he disagreed with Dr. Kanter's opinion and how he arrived at the impairment rating under the fifth edition of the A.M.A., *Guides*.

By decision dated June 4, 2008, the Office denied appellant's claim for an additional schedule award based on the opinion of Dr. Walsh, as the impartial medical specialist. On September 9, 2008 an Office hearing representative vacated the June 4, 2008 decision finding that the Office did not refer Dr. Walsh's report to an Office medical adviser. The case was remanded for appropriate action.

The record at the time of the hearing representative's decision was a July 11, 2008 report from Dr. Kanter who reexamined appellant on July 11, 2008. Dr. Kanter noted that appellant's conditions had not changed significantly since December 2002. He opined that appellant had 50 percent impairment of the left leg due to a fair result for a total knee arthroplasty under the A.M.A., *Guides*.⁴ Dr. Kanter further stated that reason would dictate that an additional 12 percent could easily be added for a person with 100 percent loss of the contralateral extremity.

In a September 22, 2008 report, an Office medical examiner reviewed Dr. Walsh's May 14, 2008 report and concurred with his conclusion.

By decision dated October 1, 2008, the Office denied appellant's claim for an additional schedule award based on Dr. Walsh's opinion. On March 13, 2009 an Office hearing representative vacated the October 1, 2008 decision and remanded the case to the Office to obtain a supplemental report from Dr. Walsh as to how he arrived at his impairment rating and to address Dr. Kanter's July 11, 2008 report. The Office was also directed to have a new medical adviser review the file.

The Office referred appellant, along with a new statement of accepted facts and the medical record, to Dr. Walsh for a follow-up appointment. In a June 7, 2009 report, Dr. Walsh reviewed the medical record and set forth his examination findings. He opined that under the fifth edition of the A.M.A., *Guides* appellant had 37 percent impairment of the left leg and discussed how he arrived at this conclusion under the A.M.A., *Guides*. Dr. Walsh also explained

⁴ This report was written at appellant's request.

why he disagreed with Dr. Kanter's 50 percent impairment assessment as noted in his July 11, 2008 report.

In a July 15, 2009 report, a new Office medical adviser⁵ reviewed the medical record and opined that appellant had 37 percent left lower extremity impairment under the fifth edition of the A.M.A., *Guides*.

In a July 27, 2009 decision, the Office denied appellant's claim for an additional schedule award based on Dr. Walsh's impartial medical opinion. In an October 1, 2009 decision, an Office hearing representative set aside the July 27, 2009 Office decision finding that the impairment should have been rated under the sixth edition of the A.M.A., *Guides* which was effective May 1, 2009. The Office was directed to refer the file and Dr. Walsh's impartial medical reports to the Office medical adviser for recalculation of appellant's impairment for the left lower extremity under the sixth edition of the A.M.A., *Guides*.

In an October 18, 2009 report, the Office medical adviser reviewed Dr. Walsh and Dr. Kanter's reports and noted that the most recent report found appellant had full range of motion and strength but needed a walker at home to ambulate. Under Table 16-3, page 511 of the sixth edition of the A.M.A., *Guides*, the Office medical adviser found that a full range of motion with mild anterior-posterior (AP) instability corresponded to a class 3 or 37 percent impairment. The Office medical adviser found maximum medical impairment was obtained on April 22, 2008, the date of Dr. Walsh's examination.

By decision dated November 12, 2009, the Office denied appellant's claim for an additional schedule award based on Dr. Walsh's reports.

On November 17, 2009 counsel requested a telephonic hearing, which was held February 18, 2010. He submitted a November 12, 2009 report from Dr. Martin Fritzhand, a Board-certified urologist specializing in occupational medicine. Dr. Fritzhand noted that appellant no longer worked for the employing establishment and was unable to weight-bear without using a walker. He noted appellant's history of injury and treatment, provided his findings on examination and reported appellant continued to have left knee complaints after his total knee replacement. Dr. Fritzhand opined that maximum medical improvement was met by January 2002. Under the sixth edition of the A.M.A., *Guides*, he cited to tables in the A.M.A., *Guides* and opined that appellant had 67 percent left lower extremity impairment.

In an April 20, 2010 decision, an Office hearing representative affirmed the November 12, 2009 decision.

⁵ The original medical adviser was Dr. David H. Garelick. The new or second medical adviser was Dr. Neil Ghodadra.

LEGAL PRECEDENT

The schedule award provision of the Act⁶ and its implementing regulations⁷ 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.⁸ 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 regulations as the appropriate standard for evaluating schedule losses.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹¹ Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion.¹³ The Office initially found a conflict in medical opinion between Dr. Kanter, a Board-certified orthopedic surgeon and Office referral physician, and the Office medical adviser regarding the extent of appellant's permanent impairment and referred appellant to Dr. Belich for an impartial medical evaluation. However, at the time of the Office's referral to Dr. Belich, there was no conflict in medical opinion under 5 U.S.C. § 8123(a) as Dr. Kanter was not appellant's treating physician. Thus, Dr. Belich was not an impartial medical examiner, but rather a second opinion physician.¹⁴ When the Office subsequently found Dr. Belich's reports

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 20 C.F.R. § 10.404.

⁸ *Linda R. Sherman*, 56 ECAB 127 (2004); *Danniel C. Goings*, 37 ECAB 781 (1986).

⁹ *Ronald R. Kraynak*, 53 ECAB 130 (2001).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹² *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹³ *Supra* note 10.

¹⁴ *See N.M.*, Docket No. 09-1971 (issued July 26, 2010).

insufficient and referred appellant to Dr. Walsh in January 2008, Dr. Walsh's status was also that of a second opinion physician and not an impartial medical examiner as there was no conflict in medical opinion at the time appellant was referred to him.

The Board finds a conflict in medical evidence was subsequently created between Dr. Kanter and Dr. Fritzhand, for appellant, and Dr. Walsh and the most recent Office medical adviser, for the government. Dr. Kanter's July 11, 2008 report provided an opinion on impairment at appellant's request. At this point, his status changed to that of a treating physician. Dr. Kanter found appellant had 50 percent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides*. Dr. Fritzhand opined that appellant had 67 percent lower extremity impairment under the sixth edition of the A.M.A., *Guides*. Dr. Walsh, however, opined in a June 7, 2009 report that appellant had 37 percent impairment of the left lower extremity under the fifth edition of the A.M.A., *Guides*. The Office medical adviser opined, in an October 18, 2009 report, that appellant had 37 percent impairment left leg impairment under the sixth edition of the A.M.A., *Guides*. As Drs. Kanter and Fritzhand disagreed with Dr. Walsh and the Office medical adviser on the extent of appellant's left leg impairment, a conflict in medical opinion evidence exists and referral to an impartial medical specialist is necessary. The case will be remanded to the Office for an impartial medical examination to resolve the conflict as to the degree of permanent impairment to appellant's left lower extremity, followed by an appropriate *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion evidence as to the extent of appellant's left leg impairment.

ORDER

IT IS HEREBY ORDERED THAT the April 20, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 10, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board