U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GARY D. TREVETHAN and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Alcoa, Tenn.

Docket No. 96-715; Submitted on the Record;
Issued June 4, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant is entitled to more than the 57 percent schedule award he received for permanent impairment of his left leg.

On February 4, 1990 appellant, a 47-year-old postal supervisor, filed a notice of traumatic injury, claiming that his left knee buckled as he was carrying a heavy box on his right shoulder, resulting in torn ligaments and tendons. The Office of Workers' Compensation Programs accepted the claim for internal derangement of the left knee and paid appropriate compensation.

Subsequently, appellant returned to work and filed a request for a schedule award. Dr. William K. Bell, a Board-certified orthopedic surgeon and appellant's treating physician, estimated that appellant sustained a 69 percent impairment of the left lower extremity, based on cruciate ligamentous instability, chondromalacia of the patella, limitation of motion, and a groin-to-ankle brace.

In a letter dated October 5, 1992, the Office asked Dr. Bell to explain his conclusion according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Tables 39 and 40 of the revised third edition. Dr. Bell responded on November 2, 1992, noting that the impairment figure should be 70 percent. The Table 39 impairment figure was based on the groin-to-ankle orthosis which was required for stability.

Dr. Bell reviewed appellant's case with an editor of the 4th edition of the A.M.A., *Guides* and noted that it did not specifically cover appellant's case. Dr. Bell stated that without his brace appellant would be 100 percent disabled. From Table 40, Dr. Bell assessed a 10 percent impairment based on chondromalacia, 15 percent based on anterior cruciate ligament loss, and 20 percent for marked ligament instability. Thus, he arrived at a 70 percent impairment of the lower left extremity.

The Office referred Dr. Bell's report to the Office medical adviser, who stated on November 17, 1992 that Dr. Bell "clouds the issue" and recommended that another opinion be obtained on whether appellant's brace fit the description in Table 39 which states that if the brace is required for extension stability, there is a 50 percent impairment of the lower extremity.

The Office referred appellant, along with a statement of accepted facts to Dr. Martin R. Baker, a Board-certified orthopedic surgeon who examined appellant on March 3, 1993. Dr. Martin noted that appellant "obviously" needed his brace when walking and that range of motion was reasonable. Dr. Martin agreed with the 70 percent permanent impairment of the left lower extremity in accordance with the A.M.A., *Guides*, and added that wearing the brace while working was "entirely necessary."

On April 4, 1993 the Office medical adviser concurred with the 70 percent impairment rating, noting that Dr. Baker's finding of a range of motion of 120 degrees contributed 11 percent to the overall rating. The Office informed the Office medical adviser that the 50 percent rating for the brace covered range of motion, pain, and weakness and that thus the 70 percent rating was incorrect.

On April 20, 1993 the Office medical adviser stated that because the brace was prescribed for knee instability, any unstable factors in the knee would come under the 50 percent rating. According to Table 51, the maximum for pain in the femoral nerve, as assessed by Dr. Baker, would be 5 percent. The Office medical adviser concluded that the 50 percent figure, combined with 3 percent for pain overall and 11 percent for loss of range of motion, equaled a 57 percent impairment of the left lower extremity, which included cruciate and collateral ligament instability problems in the orthosis rating.

On May 8, 1993 the Office issued a schedule award for 57 percent permanent impairment of appellant's left leg. The award ran from March 3, 1993 to April 25, 1996 for a total of 177.6 weeks.

On May 31, 1993 appellant informed the Office that he disagreed with the amount of the award because the second opinion specialist, Dr. Bell, to whom the Office had referred appellant, rated the left knee as 70 percent impaired. Appellant wrote a second letter on December 12, 1994 requesting an appeal. On January 12, 1995 the Office referred his case for an oral hearing, which was held on August 2, 1995.

At the hearing appellant's attorney raised three issues: first, the schedule award should have been for at least 70 percent, second, the aggravation rule should have been applied, and third, the time frame of the award was in error.

In a decision dated October 5, 1995, the hearing representative determined that the weight of the medical evidence rested with the Office medical adviser's report finding a 57 percent impairment and that the aggravation rule was not applicable to federal workers' compensation claims. The hearing representative amended the term of the award to 164 weeks, based on 57 percent of the 288 weeks allowed for 100 percent impairment of a leg.

The Board finds that appellant has failed to establish that he is entitled to more than the 57 percent schedule award he received.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulations,[2] schedule awards are payable for the permanent impairment of specified bodily members, functions, and organs. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[3]

However, neither the Act nor the regulations specify the method by which the percentage of impairment shall be determined.[4] The method used in making such determinations rests in the sound discretion of the Office.[5] For consistent results and to ensure equal justice for all claimants, the Office has adopted, and the Board has approved, the use of the appropriate edition of the A.M.A., *Guides* as the uniform standard applicable to all claimants for determining the percentage of permanent impairment.[6]

In this case, the Office medical adviser properly applied the A.M.A., *Guides* in calculating the percentage of impairment. As he noted, the 50 percent impairment rating for appellant's groin-to-ankle brace, which was prescribed because of his knee instability, covers the unstable cruciate and collateral ligament factors for which Dr. Bell assessed a 20 percent rating. Adding 11 percent for decreased range of motion (Table 39) and 3 percent for pain (Table 51), as assessed by Dr. Baker, and applying the Combined Values Table found on page 254 of the revised 3rd edition of the A.M.A., *Guides*, the overall impairment is 57 percent.

Appellant argues that the schedule award should be set aside because he had no opportunity to review the evidence and the memoranda dated April 2 and 20, 1993 prepared by the Office medical adviser. The record reveals that the hearing representative read the contents of the memoranda to appellant's attorney at the hearing. Further, the evidence upon which the 57 percent rating was based consists of the medical reports from Drs. Bell and Baker, and the appropriate tables in the A.M.A., *Guides*. Therefore, the Board finds that, contrary to appellant's argument, no violation of due process occurred in this case.

Appellant also argues that the "aggravation rule" is applicable to the Act and that appellant's preexisting impairment should have been considered in determining the degree of his current impairment. The schedule award provisions of the Act are an additional means of awarding benefits to injured workers. As such, they are explicit and straightforward in awarding

[1] 5 U.S.C. § 8101 *et seq.* (1974); 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

[3] 5 U.S.C. § 8107(c)(19); *Hermese H. Baldridge*, Docket No. 94-2276 (issued July 28, 1995).

[4] *A. George Lampo*, 45 ECAB 441, 443 (1994).

[5] *George E. Williams*, 44 ECAB 530, 532 (1993).

[6] *James J. Hjort*, 45 ECAB 595, 599 (1994).

specific amounts of compensation for permanent disability of specific parts of the body. They provide for some combination of injuries such as loss of multiple digits or both extremities,[7] and contemplate an aggravation rule[8] within a specific member.

However, the Act does not contemplate factoring into the impairment percentage of one scheduled member the degree of impairment of another member, except as specifically provided for in the Act. Thus, the fact that appellant's right leg was amputated below the knee after a nonwork-related accident does not affect the percentage of permanent impairment of his left leg, as determined by the A.M.A., *Guides.* In sum, the schedule award rating is a determination of total or partial, permanent or temporary disability for work due to a specific injury or disease. Therefore, the Board rejects appellant's argument.

The October 5, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
June 4, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

[7] 5 U.S.C. § 8107(c)(17), (20).

[8] The aggravation rule, also known as the full responsibility rule, is a workers' compensation doctrine which provides that if an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the injury alone, the entire resulting disability is compensable. A. Larson, *The Law of Workers' Compensation* §§ 12.20, 59.10; *see Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986) (*en banc*).