

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUNTHER McCONNELL and DEPARTMENT OF JUSTICE,
FEDERAL PRISON SYSTEMS, PENITENTIARY, Leavenworth, Kans.

*Docket No. 97-659; Submitted on the Record;
Issued November 9, 1998*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

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

The Board has duly reviewed the case record and concludes that appellant has no greater than a two percent permanent impairment of the left lower extremity.

On August 17, 1994 appellant, then a 46-year-old assistant food service administrator, sustained an employment-related left meniscal tear requiring arthroscopy. By decision dated May 22, 1996, the Office of Workers' Compensation Programs granted him a schedule award for a two percent permanent impairment for loss of use of the left lower extremity for the period April 29 to June 8, 1996 for a total of 5.76 weeks of compensation. On June 21, 1996 appellant, through counsel, requested reconsideration and submitted additional medical evidence. By decision dated September 30, 1996, the Office denied appellant's request. The instant appeal follows.

Under section 8107 of the Federal Employees' Compensation Act¹ and section 10.304 of the implementing federal regulations,² schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 American Medical Association, *Guides to the Evaluation of Permanent*

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.304.

Impairment (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.³

The relevant medical evidence includes a February 8, 1996 report from appellant's treating Board-certified orthopedic surgeon, Dr. William A. Bailey, who stated that he utilized the third edition, revised, of the A.M.A., *Guides*, and advised, without further explanation, that appellant had reached maximum medical improvement and had a 10 percent permanent impairment of the left lower extremity. The Office then referred appellant to Dr. George Varghese, a Board-certified physiatrist, for examination for schedule award purposes. In an April 30, 1996 report, Dr. Varghese utilized the fourth edition of the A.M.A., *Guides* and noted that appellant had undergone a partial medial meniscectomy. He measured appellant's range of motion of the left lower extremity at 0 to 135 degrees which, under Table 41, indicated no impairment. Dr. Varghese found no loss of strength on examination and concluded that, under Table 64, appellant had a 2 percent permanent impairment of the left lower extremity. An Office medical adviser reviewed the record and, in a May 13, 1996 report, advised that as Dr. Varghese had correctly applied the A.M.A., *Guides*, appellant was entitled to a two percent impairment rating. In a June 27, 1996 report, Dr. Bailey reiterated his conclusion that appellant sustained a 10 percent permanent impairment of the left lower extremity. Dr. Bailey again did not provide an explanation for this conclusion.

The Board finds that it was proper for the Office medical adviser to use Dr. Varghese's findings to rate appellant's permanent impairment. While Dr. Bailey advised that he also utilized the A.M.A., *Guides* in determining that appellant's impairment rating was 10 percent, his opinion is of diminished probative value as he did not refer to specific tables or otherwise explain the basis of his rating. Dr. Varghese, however, utilized the appropriate tables in the A.M.A., *Guides*. As it is appellant's burden to submit sufficient evidence to establish his claim,⁴ the Board finds that the Office permissibly followed the advice of its medical consultant in granting appellant a schedule award for a two percent permanent impairment of the left lower extremity.⁵

³ See *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁴ See *Annette M. Dent*, 44 ECAB 403 (1993).

⁵ See *Luis Chapa, Jr.*, 41 ECAB 159 (1989).

The decisions of the Office of Workers' Compensation Programs dated September 30 and May 22, 1996 are hereby affirmed.⁶

Dated, Washington, D.C.
November 9, 1998

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ The Board notes that the record contains an October 21, 1996 decision in which the Office denied that appellant sustained a recurrence of disability and a January 27, 1997 Office decision vacating the October 21, 1996 decision. These decisions, however, are not before the Board as they are in interlocutory posture. The Board further notes that the record contains evidence submitted to the Office subsequent to the September 30, 1996 decision. As the Board's jurisdiction is limited to review of final decisions of the Office and, thus, limited to the evidence of record which was before the Office at the time of its final decision, the Board cannot consider this evidence. 20 C.F.R. § 501.2(c).