

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAKE J. HANLEY and U.S. POSTAL SERVICE,
BULK MAIL CENTER, St. Paul, MN

*Docket No. 98-112; Submitted on the Record;
Issued February 3, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established entitlement to more than a three percent permanent impairment of his right leg for which he received a schedule award.

On January 12, 1996 appellant, then a 60-year-old tractor trailer operator, filed a claim for traumatic injury alleging that on December 14, 1995 he injured his right knee while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for right knee strain.

On April 8, 1996 appellant filed a claim for a schedule award based on his accepted injury.

In a medical report dated February 29, 1996, Dr. Thomas Comfort, appellant's treating physician Board-certified in orthopedic surgery, stated that appellant's magnetic resonance imaging (MRI) scan revealed appellant's "old partial meniscectomy injury with significant persistent residual abnormal signal from the posterior horn of the medial meniscus as well as significant degenerative changes involving the medial joint and a possible small loose body along the margin of the medial femoral condyle."

In an April 29, 1996 medical report, Dr. Comfort noted that appellant "had a previous permanent ... disability regarding his right knee of two percent established in May 1988."

In a medical report dated June 3, 1997, Dr. Comfort noted appellant's 1988 right knee arthroscopic procedure by Dr. Birkebak. He then noted that a February 21, 1996 MRI scan revealed significant residual abnormal signal over the posterior horn of the medial meniscus as well as progressive degenerative changes involving the medial joint space. Dr. Comfort noted that a repeat arthroscopic procedure performed on March 5, 1996 revealed degenerative changes of the cartilage involving the medial femoral condyle, tearing of the medial meniscus and Grade IV degenerative arthritis involving the medial tibial plateau. He then stated that "an

additional partial meniscectomy was performed, as well as chondroplasty of the medial femoral condyle, medial tibial plateau and patellofemoral joint.” In evaluating appellant for an impairment determination based on the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Comfort stated: “Calculating the total lower extremity impairment, this is a 20 percent lower extremity impairment secondary to cartilage loss of 2 millimeters on a standing film. This is from Table 62 at 10 percent impairment secondary to mild varus deformity of 0 degrees on standing films on Table 41, page 78; 7 percent impairment due to mild medial collateral ligament laxity secondary to degenerative arthritis on page 85; and a meniscectomy to a stable rim which is 2 percent, using a table on page 85. Using a Combined Values Chart on page 322, he has a total lower extremity impairment of 33 percent.” He also noted that appellant had reached maximum medical improvement on July 10, 1996.

In a medical report dated June 21, 1997, Dr. Carlo Bellabarba, an Office medical adviser and an orthopedic surgeon, stated that a review of Dr. Comfort’s June 3, 1997 medical report revealed arthroscopic findings of Grade 4 chondromalacia in the medial compartment and a resected medial meniscus tear. Relying on Dr. Comfort’s calculations and the A.M.A., *Guides*, Dr. Bellabarba stated that appellant had extension of minus 3 degrees for 0 percent impairment, Table 41,¹ and flexion of 130 degrees for 0 percent impairment, Table 41.² In evaluating appellant’s permanent partial impairment due to pain, Dr. Bellabarba combined Tables 68 and 11 to arrive at a finding of 1 percent permanent impairment for Grade 3 pain around the knee in the distribution of the saphenous nerve.³ In evaluating appellant’s permanent impairment for medial meniscectomy, he referred to Table 64 to arrive at a finding of 2 percent permanent impairment.⁴ Using the Combined Values Chart, Dr. Bellabarba found that appellant had a three percent permanent impairment of the right lower extremity.⁵

In a decision dated July 7, 1997, the Office awarded appellant a three percent permanent impairment of the right leg. The Office noted that “[T]he 33 percent of impairment was not supported by the A.M.A., *Guides* ... because of your preexisting knee condition.”⁶

Appellant appealed the July 7, 1997 decision on October 6, 1997.

¹ A.M.A., *Guides* at 78, Table 41.

² *Id.*

³ *Id.* at 89, Tables 68 and 48, Table 11.

⁴ *Id.* at 85, Table 64.

⁵ *Id.* at 322.

⁶ On October 6, 1997 the Office issued a decision vacating its July 7, 1997 decision and awarding appellant a 30 percent permanent impairment for his right lower extremity. This decision is null and void because it was issued while the case was on appeal before the Board on the same issue, pursuant to appellant’s October 6, 1997 request for an appeal; see *Douglas Billings*, 41 ECAB 880 (1990). Further, the Board notes that subsequent to the Office’s July 7, 1997 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

The Board finds that this case is not in posture for decision.

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing regulations,⁸ set forth that 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 is to be determined. For consistent results and to ensure equal justice for all claimants, the Office has adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment.⁹

In this case, the Office noted in its decision that Dr. Comfort's determination that appellant had a 33 percent impairment was not supported by the A.M.A., *Guides* "because of your preexisting condition." However, it is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.¹⁰ For the foregoing reason, the case must be set aside and remanded to the Office to consider appellant's preexisting impairment to his right leg and a *de novo* decision regarding the percentage of permanent impairment of his right leg.

The decision of the Office of Workers' Compensation Programs dated July 7, 1997 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
February 3, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.304.

⁹ *Leisa D. Vassar*, 40 ECAB 1287 (1989).

¹⁰ *See Dale Larson*, 41 ECAB 481 (1990); *Pedro DeLeon*, 35 ECAB 487 (1983).