

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK S. LLEWELLYN and DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION, Los Angeles, CA

*Docket No. 00-438; Submitted on the Record;
Issued January 12, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has more than two percent permanent impairment of his left lower extremity for which he received schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On July 20, 1998 appellant, then a 47-year-old supervisory special agent, filed a traumatic injury claim, which was accepted for a torn medial meniscus of the left knee. On September 9, 1998 Dr. James M. Fox, a Board-certified orthopedic surgeon, and appellant's attending physician, performed an arthroscopy of appellant's left knee with a shaving of the under surface of the patella and a partial medial meniscectomy.

In a report dated December 15, 1998, Dr. Fox found that appellant had reached a permanent and stationary status as of that date and could work without restrictions. He opined that appellant's subjective factors of disability consisted of "[s]light and [o]ccasional knee pain, *i.e.*, with [a] lifting exercise program, he will have occasional discomfort, as well as with changes in the weather or repetitive squatting in kneeling." Dr. Fox found that appellant had minimal objective findings of disability.

By letter dated February 11, 1999, the Office requested that Dr. Fox evaluate appellant to determine the degree of any permanent impairment in accordance with the provisions of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). The Office enclosed forms for Dr. Fox to complete applicable to determining the extent of appellant's impairment under the A.M.A., *Guides*.

In an impairment evaluation of the left lower extremity dated March 18, 1999, Dr. Fox found that appellant had atrophy but no evidence of muscular weakness. He listed measurements of appellant's right and left lower extremities three inches above the patella as 15½ inches and 15¼ inches, respectively. Dr. Fox listed measurements of appellant's right and left lower

extremities 7 inches below the patella as 18 inches and 7¾ inches, respectively. Dr. Fox noted that appellant had “pain in [his] knee when [he] runs, exercises, or moves suddenly” but no sensory loss. Dr. Fox listed the date of maximum medical improvement as December 15, 1998.

An Office medical adviser reviewed Dr. Fox’s report on April 23, 1999. He found that, according to Table 64 on page 85 of the A.M.A., *Guides*, appellant had a two percent impairment of the left lower extremity due to his partial medial meniscectomy. The Office medical adviser found that appellant’s ¼ inch loss of circumference of the left leg due to atrophy was not ratable according to Table 37 on page 77 of the A.M.A., *Guides*. He concluded that appellant had a total left lower extremity impairment of two percent and noted that he had reached maximum medical improvement on December 15, 1998.

By decision dated May 4, 1999, the Office issued appellant a schedule award for a two percent permanent impairment of the left knee. The period of the award ran for 5.76 weeks from December 15, 1998 to January 24, 1999.

By letter dated May 21, 1999, appellant requested reconsideration of the schedule award. Appellant disagreed with the amount and period of the award.

In a decision dated September 22, 1999, the Office denied appellant’s request for reconsideration on the grounds that the evidence was insufficient to warrant review of the prior decision. The Office noted that, due to a typographical error, the prior decision indicated that the schedule award was for a permanent impairment of the left knee rather than the left lower extremity. The Office amended its prior decision to correct the typographical error.

The Board finds that appellant has not established that he has more than a two percent permanent impairment of the left lower extremity.

Under section 8107 of the Federal Employees’ Compensation Act,¹ and section 10.404 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 A.M.A., *Guides* have been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.³

In a report dated March 18, 1999, Dr. Fox, appellant’s attending physician, noted that appellant experienced pain in his knee when he ran, exercised or moved suddenly. He found that appellant had atrophy in his left lower extremity but no sensory loss. Dr. Fox listed measurements above and below appellant’s patella for both the right and left lower extremity.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *James J. Hjort*, 45 ECAB 595 (1994).

However, he did not specifically refer to the A.M.A., *Guides* in rendering his findings. The Office medical adviser, on the other hand, applied Dr. Fox's clinical findings to the appropriate tables and pages of the A.M.A., *Guides*.

The Office medical adviser properly determined that appellant had a two percent impairment of the left lower extremity as a result of his partial medial menisectomy.⁴ He further found that appellant's loss of a quarter inch of the circumference of the left leg due to atrophy was not a ratable impairment under the A.M.A., *Guides*.⁵ The Office medical adviser concluded that appellant had a two percent impairment of the left lower extremity and that the date of maximum medical improvement was December 15, 1998.

Accordingly, the Board finds that the opinion of the Office medical adviser constitutes the weight of the medical evidence of record and establishes that appellant has no more than a two percent impairment of the left lower extremity.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for reconsideration under section 8128.

Section 10.606 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.⁶ Section 10.608 provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁷

Appellant argued that the Office erred in determining the extent of his permanent impairment. However, he submitted no evidence in support of his contention and, therefore, his argument is insufficient to warrant a reopening for a merit review of the case.

Appellant further alleged that the Office erred in determining that the period of the award ran from December 15, 1998 to January 24, 1999. However, the Office properly began the award on the date of maximum medical improvement as found by appellant's attending physician, Dr. Fox, and the Office medical adviser. The period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from the

⁴ A.M.A., *Guides*, 85, Table 64. The A.M.A., *Guides* indicate that when diagnosis based ratings are applied it is usually not appropriate to also apply ratings for physical examination findings. *Id.* at 85.

⁵ *Id.* at 77, Table 37.

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ 20 C.F.R. § 10.608(b).

residuals of the employment injury.⁸ The period of award ran for 5.76 weeks, the amount of time statutorily mandated under the Act for a two percent impairment of the left lower extremity.⁹

Abuse of discretion can generally be shown only through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.¹⁰ Appellant has made no such showing here and thus the Board finds that the Office properly denied his application for reconsideration of his claim.

The decisions of the Office of Workers' Compensation Programs dated September 22 and May 4, 1999 is hereby affirmed.

Dated, Washington, DC
January 12, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

⁸ *Joseph R. Waples*, 44 ECAB 936 (1993).

⁹ *See* 5 U.S.C. § 8107.

¹⁰ *Rebel L. Cantrell*, 44 ECAB 660 (1993).