

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN T. DOULETTE and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION HEALTH CARE SYSTEM, West Haven, CT

*Docket No. 03-1464; Submitted on the Record;  
Issued September 25, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has more than a three percent permanent impairment for his right lower extremity, for which he received a schedule award.

This case is before the Board for the third time. In the first appeal, the Board issued an order remanding case to the Office of Workers' Compensation Programs for reconstruction of the case record as it did not contain all the relevant documents and medical evidence necessary to address appellant's appeal. The Board directed the Office to issue a *de novo* decision upon reconstruction of the record.<sup>1</sup> In the second appeal, the Board set aside the Office's April 3, 2002 decision denying reconsideration and remanded the case for further development of the medical evidence to be followed by a *de novo* decision.<sup>2</sup> The findings of fact and the conclusions of law from the prior order and decision are hereby incorporated by reference.

On remand, the Office referred appellant together with medical records, a statement of accepted facts and a list of specific questions, to Dr. Gary Gallo, a Board-certified orthopedic surgeon, for a second opinion medical examination regarding the extent of permanent impairment of appellant's right leg. He submitted an April 8, 2003 report finding that appellant had no impairment of the right lower extremity due to his accepted employment-related knee injury. In an accompanying report dated April 3, 2003, Dr. Gallo indicated that appellant had a zero percent impairment of the right lower extremity.

On April 21, 2003 an Office medical adviser reviewed appellant's medical records, including Dr. Gallo's report and agreed with his findings.

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<sup>1</sup> Docket No. 01-0862 (issued February 28, 2002).

<sup>2</sup> Docket No. 02-2087 (issued January 28, 2003). On October 6, 1999 the Office granted appellant a schedule award for three percent impairment of the right leg.

In an April 18, 2003 letter to the Office, appellant contended that there were discrepancies in Dr. Gallo's report regarding the medical findings of Dr. Enzo Sella, a Board-certified orthopedic surgeon and a second opinion physician, and Dr. Ester Nash, an employing establishment physician. Appellant noted that Dr. Gallo did not mention the reports of Drs. David B. Brown, a Board-certified orthopedic surgeon and second opinion physician, Patrick A. Ruwe, an orthopedic surgeon, and John C. Kagan, a Board-certified orthopedic surgeon, who determined that he had a 10 percent impairment of the right knee. Appellant also contended that Dr. Gallo did not mention the reports of Drs. John Adler and Gary Grippo, podiatrists, who identified right foot impairment.

In an April 29, 2003 telephone conversation with an Office representative, appellant disagreed with the Office medical adviser's finding.

On April 30, 2003 the Office requested that the Office medical adviser clarify his previous opinion by explaining why appellant did not have an increased impairment of the knee and to indicate whether he reviewed the medical reports of Drs. Brown, Kagan and Ruwe. In response, the Office medical adviser stated that all of Dr. Gallo's findings concerning appellant's right knee were normal based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He further stated that he was unable to find the reports of Drs. Brown, Kagan and Ruwe.

On May 1, 2003 another Office medical adviser reviewed the findings of the previous Office medical adviser and the reports of the physicians who found that appellant had a 10 percent impairment of the right knee. The Office medical adviser stated that the physicians made no references to the A.M.A., *Guides* and that he concurred with Dr. Gallo's opinion. The Office medical adviser noted that appellant had no major loss of motion, no thigh atrophy, no ligament laxity, no diagnosis-based impairment and no x-ray sign of arthritis.

By decision dated May 7, 2003, the Office denied modification based on a merit review.

The Board finds that appellant has no more than a three percent permanent impairment of his right lower extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act<sup>3</sup> and its implementing regulation<sup>4</sup> set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.<sup>5</sup> 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 to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule

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<sup>3</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> 5 U.S.C. § 8107(c)(19).

awards. The A.M.A, *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.<sup>6</sup>

In his April 8, 2003 report, Dr. Gallo, an Office referral physician, provided a history of appellant's employment-related and nonemployment-related injuries and medical treatment. Dr. Gallo indicated normal results on physical examination of appellant's right leg. He diagnosed lumbar disc protrusion by history and indicated that appellant had recovered from a previous right knee injury. In response to the Office's question whether appellant had more than a three percent impairment of his right leg due to an accepted employment-related right knee injury, Dr. Gallo opined that appellant had no partial and permanent impairment of the right leg due to a knee injury based on the A.M.A., *Guides*.

In an accompanying report dated April 3, 2003, Dr. Gallo stated that appellant reached maximum medical improvement on that date. He further stated that appellant's range of active flexion was 145 degrees with 150 degrees being average.<sup>7</sup> He also stated that appellant's range of extension was two to three degrees and zero was neutral. Dr. Gallo noted that appellant had two to three degrees of flexion contracture,<sup>8</sup> that a prosthesis was not required for knee stability and there was no additional impairment of function due to weakness, atrophy, pain or discomfort estimated at zero degrees of the lower extremity. Dr. Gallo concluded that appellant had a zero percent impairment of the right lower extremity.

In finding that appellant had no more than a three percent impairment of the right lower extremity, the Office medical adviser relied on the findings of Dr. Gallo and stated that they were normal based on the fifth edition of the A.M.A., *Guides*.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no additional impairment of his right lower extremity. Further, in finding that appellant had a 10 percent impairment of the right lower extremity, Drs. Brown and Kagan failed to indicate that their impairment rating was based on tables and figures in the A.M.A., *Guides*. Appellant has failed to provide probative, supportable medical evidence that he has greater than a three percent impairment already awarded.

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<sup>6</sup> *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

<sup>7</sup> Table 17-10 of the fifth edition of the A.M.A., *Guides* provides for an impairment when knee flexion is less than 110 degrees.

<sup>8</sup> Table 17-10 of the fifth edition of the A.M.A., *Guides* provides for an impairment for greater than five degrees of flexion contracture.

The May 7, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
September 25, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member