

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FREDDIE L. SIMMONS and DEPARTMENT OF VETERANS AFFAIRS,
LONG BEACH VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA

*Docket No. 98-2437; Submitted on the Record;
Issued February 22, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether appellant has a ratable permanent impairment of his right lower extremity due to his August 29, 1996 employment injury, which entitles him to a schedule award.

On August 29, 1996 appellant, then a 60-year-old motor vehicle operator, fell off a loading dock at the employing establishment. The Office of Workers' Compensation Programs accepted that appellant sustained a fracture of the right patella.

Appellant had experienced a previous employment injury on June 12, 1986 which had been accepted by the Office as a fracture of the right patella. On September 24, 1987 appellant had been granted a schedule award for a 20 percent permanent impairment of his right lower extremity. This award was based upon a reduced range of motion of the right knee with 120 degrees of retained flexion which was a 10 percent impairment, that was combined with a 10 percent impairment of the right lower extremity due to degenerative changes of the knee which included chondromalacia within the right patella.

On June 19, 1997 appellant filed a claim for a schedule award for permanent impairment of his right knee due to the August 29, 1996 injury. In support of his claim, appellant submitted a September 10, 1997 report from Dr. Ronald E. Glousman, a Board-certified orthopedic surgeon, which noted that appellant demonstrated moderate right knee pain about the retropatellar region and medial joint line, exacerbated by flexion, internal rotation, long standing, climbing, bending and twisting, an antalgic gait, 1½ centimeters of quadriceps atrophy and reduced quadriceps strength with knee extension. X-rays at that time demonstrated degenerative changes in the right knee and symptomatic right knee chondromalacia was diagnosed.

By report dated November 19, 1997, Dr. Glousman indicated that appellant was permanent and stationary. He noted that appellant still had slight pain about the right knee that was aggravated with climbing, bending, squatting and kneeling, 5 degrees of reduced flexion on

the right, 1.5 centimeters of quadriceps atrophy, mild quadriceps weakness¹ and symptomatic right knee chondromalacia. However, no permanent impairment rating was provided.

By report dated January 24, 1998, Dr. Arthur S. Harris, an Office orthopedic medical consultant and a Board-certified orthopedic surgeon, reviewed Dr. Glousman's reports, noted his findings of quadriceps atrophy and mild limitation of knee flexion, misstated his findings of objective mild quadriceps weakness,² but based his impairment rating solely on Dr. Glousman's diagnosis of right patella chondromalacia using only the Arthritis Impairment table of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. The presence of objective quadriceps atrophy and quadriceps weakness and loss in range of motion were not clearly considered in determining the rating, nor was any impairment due to the accepted condition of right patellar fracture. Dr. Harris opined that according to the A.M.A., *Guides* appellant had a 5 percent impairment of his right lower extremity due to "right patella chondromalacia" and that it was the sole impairment resulting from the accepted work injury. He, however, did not comment upon contribution by the preexisting, pre-1996 injury which resulted in a 10 percent permanent impairment of the right knee due to degenerative changes of the right knee including chondromalacia or the 10 percent impairment due to loss in range of right knee flexion.

The Office reviewed Dr. Harris' incomplete findings and unrationalized opinion and opined by decision dated June 11, 1998 that appellant was not entitled to any schedule award due to his August 29, 1996 injury, because he had been previously paid a schedule award for 20 percent impairment of his right knee due to his 1986 injury. The Office opined that although Dr. Harris found a 5 percent impairment due to appellant's 1996 injury, his prior schedule award of 20 percent for his 1986 injury exceeded the 5 percent award of his most recent impairment rating, such that he was now entitled to nothing.

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

Section 8107 of the Federal Employees' Compensation Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.³

¹ Although on the table in the November 19, 1997 report Dr. Glousman annotated equal quadriceps strength between the left and right quadriceps, 5 and 5, this table is at variance with his September 10, 1997 report table in which he noted 5 in right quadriceps strength testing. However, in his listing of objective factors of appellant's condition in the November 19, 1997 report Dr. Glousman stated that objectively there was mild right quadriceps weakness.

² See *supra* note 1 and accompanying text.

³ 5 U.S.C. § 8107(a). It is thus the claimant's burden of establishing that she sustained a permanent impairment of a scheduled member or function as a result of her employment injury; see *Raymond E. Gwynn*, 35 ECAB 247 (1983) (addressing schedule awards for members of the body that sustained an employment-related permanent impairment); *Philip N.G. Barr*, 33 ECAB 948 (1982) (indicating that the Act provides that a schedule award be payable for a permanent impairment resulting from an employment injury).

The schedule award provision of the Act⁴ and its implementing regulation⁵ 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 loss of use.⁶ However, neither the Act nor its regulations specify the manner in which the percentage of loss of a member is to 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 awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.⁷

The standards for evaluating the percentage of impairment of extremities under the A.M.A., *Guides* are based primarily on loss of range of motion. In determining the extent of loss of motion, the specific functional impairments, such as loss of flexion or extension, should be itemized and stated in terms of percentage loss of use of the member in accordance with the tables in the A.M.A., *Guides*.⁸ However, all factors that prevent a limb from functioning normally should be considered, together with the loss of motion, in evaluating the degree of permanent impairment.

The Office's procedure manual notes that some objective and subjective impairments, such as pain, atrophy, deformity, loss of sensation, loss of strength, sensitivity to heat or cold and soft tissue damage, cannot easily be measured by the A.M.A., *Guides*, but that the effects of any such factors should be explicitly considered along with measurable impairments and correlated as closely as possible with factors set forth in the A.M.A., *Guides*.⁹

In the instant case, Dr. Harris did not consider any other reported objective impairment except the diagnosed condition of right patellar chondromalacia in determining appellant's impairment due to his August 29, 1996 fractured right patella. Therefore, his opinion as to appellant's permanent impairment rating due to his August 29, 1996 injury is incomplete and consequently of reduced probative value. It is also of further reduced probative value in that it lacks any medical rationale supporting his conclusions and lacks any consideration of the fact that appellant had been diagnosed pre-1996 injury with preexisting right patellar chondromalacia and had been rated with a 10 percent right lower extremity impairment due to chondromalacia and other degenerative manifestations. Consequently, Dr. Harris' report is insufficient to determine appellant's permanent impairment due to his August 29, 1996 injury.

⁴ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁵ 20 C.F.R. § 10.304.

⁶ 5 U.S.C. § 8107(c)(19).

⁷ *James J. Hjort*, 45 ECAB 595 (1994); *Thomas D. Gauthier*, 34 ECAB 1060 (1983).

⁸ *William F. Simmons*, 31 ECAB 1448 (1980); *Richard A. Ehrlich*, 20 ECAB 246, 249 (1969) and cases cited therein.

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a)(2) (March 1995).

However, the Office erroneously concluded in this case that permanent impairment due to the 1996 injury would not be compensable if it was found to be less than the permanent impairment rating given appellant for his 1986 injury, an entirely different claim based upon different enumerated objective deficits. This determination is not supported by the Office procedure manual, the regulations, or by Board precedent. Merely because the injuries 10 years apart were to the same body part, this fact does not give the Office the authority to invoke principles applicable only to the situation where an appellant has received a schedule award for an injury and seeks modification of that award due to claimed increased permanent impairment resulting from that same injury, meaning the injury occurring at the same time and place and under the same circumstances. As the Office improperly applied its regulations and procedures in this case, its June 11, 1998 decision is incorrect and will be set aside.

The case therefore will be remanded to the Office for referral to an appropriate specialist for consideration of all of appellant's objective findings related to his August 29, 1996 employment injury and accepted condition of right patellar fracture and for a determination of the nature and extent of appellant's permanent impairment related to that injury, or to any permanent aggravation of preexisting conditions due to that injury, supported by complete medical rationale and in accordance with the A.M.A., *Guides*.

Consequently, the decision of the Office of Workers' Compensation Programs dated June 11, 1998 is hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
February 22, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member