

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of STEVEN W. POLLARD and DEPARTMENT OF TRANSPORTATION,  
COAST GUARD, Baltimore, MD

*Docket No. 02-1596; Submitted on the Record;  
Issued May 14, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

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

On July 6, 1999 appellant, a 48-year-old electrician, filed a claim for traumatic injury, alleging that, on June 17, 1999, he sustained an injury to his left knee while in the performance of duty.

In a report dated July 19, 1999, Dr. Magdi H.G. Henein, appellant's treating physician Board-certified in orthopedic surgery, stated that he had examined appellant after the June 17, 1999 injury. He noted appellant's prior medical history, noting that, on February 18, 1999, he had undergone arthroscopic surgery to the left knee, including a partial medial meniscectomy and chondroplasty of the medial femoral condyle. Dr. Henein also noted that appellant "had responded well to treatment and had no symptoms related to his left knee prior to his most recent injury."

On October 5, 1999 the Office of Workers' Compensation Programs accepted appellant's claim for internal derangement of the left knee. The Office also authorized arthroscopy and arthrotomy of the left knee and related physical therapy. In a report dated November 10, 1999, Dr. Henein stated that, on November 5, 1999, appellant underwent arthroscopic surgery with partial medial meniscectomy and chondroplasty of the medial femoral condyle.<sup>1</sup> Appellant returned to light duty on March 7, 2000 and full duty on May 2, 2000.

In a report dated May 22, 2000, Dr. Henein stated that appellant had reached maximum medical improvement on that day.

On October 15, 2001 appellant submitted a claim for a schedule award.

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<sup>1</sup> Appellant underwent the same surgical procedures on February 18, 1999.

The Office subsequently referred appellant to Dr. Ricardo L. Cook, a Board-certified orthopedic surgeon, to determine the extent of appellant's left medial meniscus tear due to the June 17, 1999 work-related injury.

In a report dated October 15, 2001, Dr. Cook stated that he had examined appellant on October 3, 2001 and reported findings. He determined that appellant had left knee degenerative joint disease. Dr. Cook advised that appellant's knee range of motion was 0 to 115 degrees, with no instability and no deformity or length discrepancy. He read x-rays to reveal a two millimeter space between the patellofemoral joint and a two millimeter space in the medial compartment. He determined that, based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed. 2001), appellant had an 8 percent impairment of his medial compartment and a 4 percent impairment of his patellofemoral compartment, for a total of a 12 percent impairment rating. In a report dated February 22, 2002, Dr. Cook stated that appellant's date of maximum medical improvement was October 15, 2001 and that he recommended an impairment rating of 12 percent for the left lower extremity. In a report dated April 3, 2002, the Office medical adviser determined that, based on the A.M.A., *Guides* (5<sup>th</sup> ed. 2001), appellant had a two percent impairment of the left leg based on a partial meniscectomy.<sup>2</sup> Dr. Cook also noted that appellant's date of maximum medical improvement was November 5, 2000.

In a decision dated April 15, 2002, the Office awarded appellant a two percent impairment rating of the left lower extremity. The award ran from November 5 to December 15, 2000.

In a letter postmarked June 2, 2002 and stamped received on June 10, 2002, appellant appealed the Office's April 15, 2002 decision with the Board. Appellant requested "a review of my case for reconsideration."<sup>3</sup>

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

The schedule award provisions of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulation<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be

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<sup>2</sup> A.M.A., *Guides* at 546, Table 17-33 (5<sup>th</sup> ed. 2001).

<sup>3</sup> On June 5, 2002 the Office received a copy of appellant's letter to the Board that included an annotation indicating that a "copy [was] sent also to ECAB, Washington, DC." On October 7, 2002 the Office rescinded its April 15, 2002 decision and awarded appellant a 28 percent schedule award of the left leg. However, appellant had filed his appeal with the Board prior to the Office's October 7, 2002 decision. Because the Board took jurisdiction of the case prior to the Office's October 7, 2002 decision, the Office's decision is null and void. *Douglas E. Billings*, 41 ECAB 880 (1990).

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>6</sup>

It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.<sup>7</sup> As noted by Larson, “This is sometimes expressed by saying that the employer takes the employee as it finds that employee.”<sup>8</sup> The Office procedure manual provides that the Office should advise any physician evaluating permanent impairment to use the A.M.A., *Guides* and to report all findings of permanent impairment in accordance with those guidelines.<sup>9</sup> The procedure manual notes that some objective and subjective impairments, such as pain, atrophy, loss of sensation and scarring, 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*.<sup>10</sup> The Office procedure manual requires that these factors be considered, including any impairment due to appellant’s prior left leg impairment and correlated as closely as possible with the factors set forth in the A.M.A., *Guides*.<sup>11</sup>

As Dr. Henein’s July 19, 1999 report noted appellant’s February 18, 1999 left knee surgery that was similar to the surgery the Office authorized on October 5, 1999 and performed on November 5, 1999, the Office should have clearly advised Dr. Cook that all factors impairing appellant’s left lower extremity prior to the injury, including his prior surgery, should be considered and supported by objective evidence, if possible, in determining his left lower extremity impairment rating.<sup>12</sup>

For this reason, the report of Dr. Cook is of diminished probative value and insufficient to determine appellant’s left leg impairment rating. Because the Office failed to properly and fully advise Dr. Cook, in accordance with its own procedure manual, to provide an assessment of all factors affecting appellant’s left lower extremity impairment, the case must be remanded for further development to determine the extent of appellant’s left lower extremity impairment.<sup>13</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.5 (March 1995); see *Lela M. Shaw*, 51 ECAB 372 (2000).

<sup>8</sup> A. Larson, *The Law of Workers’ Compensation*, § 9.02 (2000).

<sup>9</sup> The Board notes that the file does not include a statement of accepted facts with a history of appellant’s prior surgery, nor a list of questions for Dr. Cook, the second opinion physician, that may otherwise have included a reference to his preexisting left knee condition.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- *Medical, Schedule Awards*, Chapter 3.700.3 (October 1990).

<sup>12</sup> *Raymond E. Gwynn*, 35 ECAB 247 (1983).

<sup>13</sup> In a report dated July 9, 1999, a physical therapist who was treating appellant based on his May 17, 1999 work-related injury, related appellant’s past medical history as “unremarkable.” In a report dated January 14, 2000, a field nurse noted that appellant related that his November 1999 surgery was “the first surgery he has undergone.”

Upon remand, the Office should refer appellant to an appropriate consultant, with a statement of accepted facts including a history of appellant's prior surgery, to determine whether appellant has a greater than two percent impairment of his left lower extremity for which he received a schedule award. After such further development as necessary, the Office shall issue a *de novo* decision.

The decision of the Office of Workers' Compensation Programs dated April 15, 2002, is hereby set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC  
May 14, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member