United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	**Docket No. 06-1844**
	)	**Issued: February 14, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 8, 2006 appellant filed a timely appeal from a June 29, 2006 decision which denied modification of the Office's May 9, 2006 decision regarding appellant's schedule award for the right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

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

FACTUAL HISTORY

On November 30, 1995 appellant, then a 53-year-old police sergeant, filed a traumatic injury claim for a dislocated right knee in the performance of duty. He stopped work on December 1, 1995. The Office accepted appellant's claim for a right patellar tendon rupture and

authorized surgery consisting of open repair of the right patellar tendon with internal fixation which occurred on December 1, 1995.[1] Appellant received appropriate compensation benefits.

In a July 9, 2001 report, Dr. Robert Cutrell, Board-certified in internal medicine, opined that appellant had osteoarthritis of the knee. He checked the box "yes" in response to whether he believed appellant's condition was caused or aggravated by an employment activity and noted that osteoarthritis was commonly associated with injuries to the affected joint. Dr. Cutrell indicated that appellant experienced more pain than before. He indicated that appellant had reached maximum medical improvement and should be able to fully return to work.

On July 23, 2001 appellant requested a schedule award.

By letter dated August 15, 2001, the Office advised appellant to submit medical evidence in support of his claim based upon the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a November 20, 2001 report, Dr. Eric Benz, a Board-certified orthopedic surgeon, noted appellant's history of injury and treatment and conducted a physical examination. He noted that appellant had a well-healed eight inch scar, no swelling in the knee or leg, and no atrophy. Dr. Benz advised that appellant's range of motion was 0 to 125 degrees versus 0 to 135 degrees on the left and indicated that appellant's x-rays showed very early degenerative changes. He opined that appellant had reached maximal medical improvement and had a seven percent impairment of the left lower extremity.[2]

In a March 22, 2003 report, an Office medical adviser noted that Dr. Benz did not refer to the A.M.A., *Guides.* He utilized the A.M.A., *Guides* and explained that appellant was not entitled to impairment due to decreased range of motion of the right knee as his range of motion did not demonstrate any impairment. The Office medical adviser noted that appellant had 25 percent sensory deficit for continued mild knee pain under Grade 4 in Table 16-10.[3] He explained that the maximum lower extremity impairment for pain in the distribution of the femoral nerve would warrant two percent impairment and he referred to Table 17-37.[4] The Office medical adviser determined that appellant had 1 percent impairment (25 percent of 2 percent) to the lower extremity for pain and had reached maximum medical improvement on November 20, 2001.

By letter dated November 19, 2003, the Office requested that the employing establishment update appellant's pay rate information.

[1] The Office also accepted appellant's claim for a recurrence of disability on June 15, 1997 and authorized surgery on June 19, 1997.

[2] It appears that he meant the right lower extremity.

[3] A.M.A., *Guides* 482.

[4] *Id*. at 552.

On October 11, 2005 the Office granted appellant a schedule award for one percent permanent impairment of the right foot. The award covered the period November 20 to December 10, 2001.

On November 7, 2005 appellant requested a telephonic hearing.[5] By letter dated March 23, 2006, he alleged that his right knee was not getting any better. Appellant explained that he recently received an injection for pain and swelling and that his physician recommended a knee replacement. He also advised the Office that he had retired.[6]

In a February 13, 2006 report, Dr. Jeffrey Whiting, a Board-certified orthopedic surgeon, noted that appellant had complaints of right knee pain, swelling and crunching as well as crepitus with activity. He advised that appellant had a well-healed surgical scar, active extension and good strength to resistance and no evidence of instability. Dr. Whiting noted that x-rays showed tricompartmental osteoarthritis with joint space narrowing in the medial space. He also noted that appellant desired a total knee arthroplasty because his quality of life was limited with knee pain; however, he agreed to try another injection first.

By decision dated May 9, 2006, the Office hearing representative affirmed the October 11, 2005 schedule award. The Office hearing representative determined that the Office incorrectly utilized the pay rate in effect on the date of injury for determining appellant's compensation. The case was remanded for appropriate development to determine appellant's pay rate on June 15, 1997, the date of his recurrence of disability, to see if it was greater than on the date he was injured, and if so, to adjust the amount of pain in his schedule award accordingly.[7]

By letter dated June 1, 2006, appellant requested reconsideration. In support of his request, he submitted copies of previously submitted medical reports. Appellant included new evidence which did not provide any impairment rating.

In a June 11, 2006 report, the Office medical adviser noted that appellant reached maximum medical improvement on November 20, 2001 and that he was not entitled to an additional award. He explained that appellant had already received an award of one percent for Grade 4 pain in the distribution of the femoral nerve pursuant to Table 16-10 and 16-15.[8] Furthermore, he advised that appellant had normal range of motion of the right knee. The Office medical adviser indicated that no award could be given for decreased cartilage interval as there were no radiographs to review.

By decision dated June 20, 2006, the Office denied modification of its May 9, 2000 decision.

[5] The hearing was scheduled for March 13, 2006. Appellant subsequently missed the hearing, his request to reschedule was denied and it was changed to an examination of the written record.

[6] The record reflects that appellant retired on February 29, 2004.

[7] An adjustment was made on June 8, 2006.

[8] A.M.A., *Guides* 482, 492.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[9] and its implementing regulation[10] 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 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.[11]

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*.[12] 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.[13]

ANALYSIS

In support of his claim for a schedule award, appellant submitted a November 20, 2001 report from Dr. Benz who noted appellant's history of injury and treatment and conducted a physical examination. Dr. Benz noted that appellant had a well-healed eight inch scar, no swelling in the knee or leg and no atrophy. He advised that appellant's range of motion was 0 to 125 degrees versus 0 to 135 degrees on the left. Appellant's x-rays showed very early degenerative changes. Dr. Benz opined that appellant had reached maximal medical improvement and had a seven percent impairment of the right leg. However, he did not explain how he made the impairment rating as there was no reference to the A.M.A. *Guides*. Dr. Benz did not discuss how he arrived at his conclusion or refer to any tables or pages of the A.M.A. *Guides* in determining the extent of the impairment.[14] The Board finds that, as Dr. Benz did not include an impairment rating under the A.M.A. *Guides,* the Office properly relied upon the findings of the Office medical adviser.

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[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

[11] A.M.A., *Guides* (5th ed. 2001).

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

[13] *Bernard A. Babcock, Jr*., 52 ECAB 143 (2000); *see also Paul A. Toms*, 28 ECAB 403 (1987).

[14] *See James R. Hill*, 57 ECAB ___ (Docket No. 05-1899, issued May 12, 2006) (schedule awards are to be based on the A.M.A., *Guides*; an estimate of permanent impairment is irrelevant and of diminished probative value where it is not based on the A.M.A., *Guides*).

The Office medical adviser relied upon the findings on examination made by Dr. Benz. He applied the fifth edition of the A.M.A. *Guides*, to determine that appellant had no impairment for loss of range of motion of the right knee as the examination revealed a full range of motion.[15] The Office medical adviser noted that appellant had a 25 percent sensory deficit for continued mild knee pain to Grade 4 pursuant to Table 16-10.[16] The Office medical adviser explained that the maximum lower extremity impairment allowed for pain in the distribution of the femoral nerve was two percent at Table 17-37.[17] Thus, he determined that appellant had to a one percent impairment to the lower extremity for pain and had reached maximum medical improvement on November 20, 2001.[18] In a June 11, 2006 report, the Office medical adviser reiterated that appellant did not have greater impairment. Appellant received an award of one percent for Grade 4 pain in the distribution of the femoral nerve pursuant to Tables 16-10 and 17-37.[19] The Office medical adviser reiterated that appellant had a normal range of motion and that no award could be given for decreased cartilage interval absent proper radiographs to review.

There is no probative medical evidence of record establishing that appellant has more than a one percent impairment of the right leg for which he received a schedule award.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained more than a one percent permanent impairment of his right lower extremity, for which he received a schedule award.

[15] Dr. Benz reported knee flexion of 125 degrees. Table 17-10 at page 537 of the A.M.A., *Guides* states that no impairment rating is warranted unless flexion is less than 110 degrees.

[16] A.M.A., *Guides* 482.

[17] *Id*. at 552.

[18] This is consistent with the procedure set forth in Table 16-10 at page 482 of the A.M.A., *Guides* by which the severity of the sensory deficit, 25 percent, is multiplied by the maximum impairment value for pain for the implicated nerve, 2 percent. This equals one half of one percent. This is rounded to one percent.

[19] A.M.A., *Guides* 482, 492.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 29 and May 9, 2006 are affirmed.

Issued: February 14, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board