U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES R. DOTY and TENNESSEE VALLEY AUTHORITY, WATTS BAR NUCLEAR PLANT, Chattanooga, TN

Docket No. 98-995; Submitted on the Record;
Issued December 12, 2000

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's schedule award for permanent partial impairment to the left lower extremity and, if so, whether this resulted in an overpayment of compensation.

The Office accepted appellant's claim for a February 3, 1982 strain of the left knee and the subsequent condition of subluxation patella with chondromalacia. Appellant underwent an approved arthroscopic surgery on August 4, 1982, an unapproved left knee surgery on February 23, 1983, and was approved for an additional arthroscopic surgery in November 1994, but there is no evidence that such surgery was performed. Appellant received compensation benefits from the time of injury and has been paid compensation for total wage loss beginning March 21, 1982.

In a report dated October 18, 1988, Dr. Cletus J. McMahon, Jr., an Office referral physician and Board-certified orthopedic surgeon, provided a history of appellant's condition and related appellant's complaints concerning pain, difficulty with squatting and stooping, and of popping and cracking in his knee. He indicated that appellant had a good range of motion to his knee even though there was obvious patella femoral crepitation on range of motion. Diffuse tenderness was noted around the patella, with no medial lateral joint line tenderness. The x-rays revealed slight irregularity on the intra-articular surface of the patella. Appellant was diagnosed with severe chondramalacia of the left patella. Dr. McMahon opined that further surgery would not help and felt that appellant had a 10 percent permanent impairment to his left knee.

In a supplemental letter of March 2, 1989, Dr. McMahon stated:

> "According to [the] A.M.A., guidelines, I felt that [appellant] had a ten percent (10%) permanent physical impairment to the left knee as a result of this injury. In reference to your actual questions, he is certainly having pain and weakness in the left leg, secondary to his chondromalacia of the patella. He certainly has no loss

of sensation, and I would not expect him to have any loss of sensation for this problem. He has almost full extension to 115 degrees of flexion, and I feel that he has probably lost about 25 degrees of motion." Dr. McMahon stated that he did not take exact muscle measurements of both legs.

In a March 16, 1989 report, the Office medical adviser agreed with Dr. McMahon's assessment that appellant had 10 percent permanent impairment of the left lower extremity.

By decision dated November 15, 1990, the Office granted appellant a schedule award based upon a 10 percent permanent impairment of the left lower extremity.

By decision dated March 8, 1991, an Office hearing representative set aside the November 15, 1990 decision and remanded the case for further development. The hearing representative found that the evidence of record did not reflect that the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, was utilized and directed the Office to refer the file to an Office medical adviser to compute the percentage of permanent impairment in accordance with the appropriate tables of the A.M.A., *Guides*. The hearing representative additionally advised that, if the medical reports of record were insufficient to calculate the percentage of impairment, the Office should refer appellant to an appropriate orthopedist to obtain such information. Payment of compensation for total wage loss was reinstated.

In a report dated April 19, 1991, another Office medical adviser reviewed the medical records and opined that appellant had a 16 percent permanent impairment of his left lower extremity based upon on the third edition of the A.M.A., *Guides* and Dr. McMahon's March 2, 1989 and October 18, 1988 medical reports. He noted that the date of maximum medical improvement was March 2, 1989.

In his calculations, the Office medical adviser noted that retention of flexion was 125 degrees, which equated to a 9 percent deficit under Table 35, page 61. Appellant also had pain which was graded at 5 percent for the femoral nerve under Table 47, page 70 which was multiplied by 60 percent pursuant to description 3 of Table 10, page 40 to give a pain rating of 3 percent. Appellant's chrondromalacia was classified as equivalent to disorder number 5 under Table 36, page 61 which had a value of 0 to 20 percent according to the deformity.[1] The Office medical adviser opined that the patellar chondromalacia was five percent based on the fact that the chondromalacia of the patellar compartment would approximate one quarter of the knee's compartment. The 9 percent deficit for retention of flexion combined with the 3 percent pain rating and 5 percent chondromalacia rating equated to a 16 percent permanent impairment rating of the left lower extremity.

[1] Although the Office medical adviser wrote that the description of appellant's chrondromalacia was equivalent to disorder number 6, the Board finds that from the context of Office medical adviser's statements, he was referring to disorder number 5 under Table 36, page 61.

By decision dated August 21, 1996, the Office issued an amended award of 16 percent permanent impairment to the left lower extremity.[2] The Office found that appellant was entitled to a total award of 322.56 days and as appellant was previously paid 140 days from November 18, 1990 through April 6, 1991, the remaining 182.56 days would be paid from August 18, 1996 through February 16, 1997.

In a July 8, 1994 report, Dr. Thomas Moses, appellant's treating doctor and an orthopedic surgeon, related that appellant was still having trouble with his left knee. The physical examination revealed tenderness in the medial and lateral jointline area, with no effusion. Appellant retained full flexion and extension, although a half-inch muscle atrophy of the left calf about three inches above the superior pole of the patella was noted. Dr. Moses stated that he agreed that appellant had 10 percent permanent impairment to the lower extremity. Another arthoscopic examination was proposed.

On June 17, 1996 another Office medical adviser reviewed the medical evidence and opined that appellant had a 9 percent impairment of the left lower extremity based on the appropriate tables in the fourth edition of the A.M.A., *Guides*. The medical adviser noted that the fourth edition of the A.M.A., *Guides* did not allow compensation for chondromalacia and found the date of maximum medical improvement to be July 8, 1994. The Office medical adviser indicated that under Table 41, page 78, a retention of flexion at 125 degrees equated to a 0 percent impairment. Appellant had a 3 percent impairment due to discomfort or pain regarding the femoral nerve under Table 20. Under Table 37, page 77, appellant's 1.27 centimeters atrophy of the thigh equated to a 6 percent impairment. The Office medical adviser added the impairment values for a total of nine percent permanent impairment of the left lower extremity.

By decision dated November 10, 1997, an Office hearing representative modified the schedule award decision of August 21, 1996 to reflect entitlement to compensation for a nine percent impairment. The hearing representative found that when the Office issued the *de novo* award on August 21, 1996, the fourth edition of the A.M.A., *Guides* should have been utilized as the basis for determining appellant's entitlement to compensation under the schedule award provisions of the Federal Employees' Compensation Act as they became effective November 1, 1993. The hearing representative further found that, as the date of maximum medical improvement was July 8, 1994, the schedule award should commence on July 8, 1994. The hearing representative calculated that as appellant had previously received compensation for 26.14 weeks from August 18, 1996 to February 16, 1997 pursuant to the award granted on

[2] The record reflects that during this time appellant obtained a Bachelor of Science degree in business administration and started working on April 4, 1994 as a traffic manager in the private sector. Appellant quit approximately two months later to go into his own business. By decision dated July 12, 1994, the Office determined that appellant's actual earnings as a traffic manager fairly and reasonably represented his wage earning capacity. It was noted that appellant's monetary compensation was reduced effective April 4, 1994 based upon his actual earnings.

August 21, 1996 and as he was only entitled to 25.92 weeks of compensation, an overpayment resulted.[3]

The Board finds that the Office improperly reduced appellant's previously issued schedule award of 16 percent permanent impairment to the left lower extremity to 9 percent.

The schedule award provision of the Act[4] and its implementing regulations[5] 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 use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.[7]

In this case, the Office hearing representative found that appellant was only entitled to a nine percent impairment under the fourth edition of the A.M.A., *Guides* and that the Office improperly based its August 21, 1996 decision on the third edition of the A.M.A., *Guides*. FECA Bulletin No, 94-4, issued November 1, 1993, states that effective that day, the Office shall use the fourth edition of the A.M.A., *Guides*, published in 1993. "As of that date, correspondence with treating physicians, consultants and second opinion specialists *should reflect the use of the new edition*." (Emphasis added.) The Office was directed on March 8, 1991 to issue a *de novo* decision concerning appellant's entitlement to compensation under the schedule award provision. In a report dated April 19, 1991, an Office medical adviser referenced the third edition of A.M.A., *Guides*, the edition in effect at that time, and found a 16 percent impairment rating. In a report dated June 17, 1996, another Office medical adviser referenced the fourth edition of the A.M.A., *Guides* and opined that appellant only had a nine percent impairment rating. Given the dates each Office medical adviser issued his report, the appropriate versions of the A.M.A., *Guides* were utilized.

The FECA Bulletin further states: "Awards calculated according to any previous edition should be evaluated according to the edition originally used. Any recalculations of previous awards which result from hearings, reconsiderations or appeals should, however, be based on the fourth edition of the A.M.A., *Guides* effective November 1, 1993."

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[3] The hearing representative who had originally conducted the hearing on May 15, 1997 was no longer with the Branch of Hearings and Review. The current hearing representative stated that the decision was reached based upon the entire record, including the hearing transcript. The Board finds that there is no indication of any impropriety. *See David E. Murray*, 34 ECAB 70 (1982). Moreover, the Board's review of the merits of this case renders the argument moot. *See Lan Thi Do*, 46 ECAB 366 (1994).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.304.

[6] 5 U.S.C. § 8107(c)(19).

[7] *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

However, in this case, the Office was directed to issue a decision pertaining to appellant's entitlement to a schedule award on March 8, 1991 and followed such directive by asking its Office medical adviser to calculate an impairment rating, which was completed on April 19, 1991. Thus, the recalculation of the previous award occurred on April 19, 1991, prior to the effective date for the fourth edition of the A.M.A., *Guides*. There is no explanation regarding why the schedule award was not issued until August 21, 1996, approximately five years after the Office was directed to issue such a decision.[8] Given the fact that the case was in posture for a schedule award determination on April 19, 1991, that the award was properly calculated according to the edition in use at that time, the Board finds that the third edition of the A.M.A., *Guides* is the applicable edition upon which the schedule award should be based. As such, the August 21, 1996 decision of the Office, which awarded a 16 percent permanent impairment of the left lower extremity, was proper.

The FECA Bulletin further states:

> "[A]s with previous revisions to the A.M.A., *Guides*, awards made prior to November 1, 1993 should not be recalculated merely because a new edition of the A.M.A., *Guides* is in use. A claimant who has received a schedule award calculated under a previous edition may later make a claim for an increased award, which should be calculated according to the fourth edition. Should the later calculation result in a percentage which is lower than the original award, the claims examiner or hearing representative should make the finding that the claimant has no more than the percentage of impairment originally awarded, and that therefore the Office has no basis for declaring an overpayment."

In his report of June 17, 1996, the Office medical adviser determined that appellant had a nine percent impairment of the left lower extremity based on the fourth edition of the A.M.A., *Guides*. Inasmuch as the recalculation of the impairment under the fourth edition resulted in a percentage which is lower than the original award of 16 percent, the Office hearing representative should have found that appellant was not entitled to more than the 16 percent already awarded. Accordingly, the Office hearing representative's finding is modified to reflect that appellant has not established entitlement to more than that already awarded. Therefore, that portion of the hearing representative's decision which found an overpayment of compensation is set aside.

[8] *See generally Bossy W. Anderson*, 41 ECAB 833 (1990) (there is a long-recognized general rule of evidence that all things being equal, positive evidence is stronger than negative evidence).

The decision of the Office of Workers' Compensation Programs dated November 10, 1997 is hereby affirmed, as modified.

Dated, Washington, DC
December 12, 2000

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member