U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EARL L. HICKS and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket No. 99-380; Submitted on the Record;
Issued May 24, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

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

The Office of Workers' Compensation Programs accepted that on May 30, 1996 appellant, then a 51-year-old laborer, sustained a right knee contusion and torn medial meniscus, for which he subsequently underwent arthroscopic surgery on November 21, 1996. Appellant thereafter returned to work with full unrestricted duty on March 19, 1997.

On October 23, 1997 the Office granted appellant a schedule award for a four percent permanent impairment of his right lower extremity for the period March 19 to June 7, 1997, for a total of 11.52 weeks of compensation. This award consisted of a two percent impairment for the partial medial meniscectomy without crepitation or sensorimotor defects[1] and two percent impairment due to pain in the distribution of the femoral nerve.[2] Using the Combined Values Chart,[3] these ratings result in a four percent permanent impairment of the right lower extremity.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fourth edition 1993), Chapter 3, Table 64, p. 85.

[2] *See* A.M.A., *Guides*, Chapter 3, Table 68, p. 89. Appellant complained of some continued right knee pain exacerbated with stair climbing. Physical examination on July 31, 1997 revealed no effusion, atrophy, weakness or instability and no compensable losses in range of motion; *see* A.M.A., *Guides*, Chapter 3, Table 41, p. 78.

[3] *See* p. 322. of the A.M.A., *Guides*.

By letter dated June 8, 1998, appellant, through his representative, requested reconsideration of the schedule award amount, alleging that he had a 50 percent impairment of his right lower extremity. The representative requested $30,000.00 compensation plus attorney fees.[4]

In support of the request appellant submitted a May 20, 1998 report from Dr. David J. Smith, a Board-certified orthopedic surgeon, which stated: "Based on the review of the A.M.A., *Guidelines [sic]* I feel that [appellant] has a 50 percent impairment of the right lower extremity which equates to 20 percent impairment of the whole person." Dr. Smith noted that a second examining physician opined that appellant's residual pain was consistent with patellofemoral chondrosis and that on x-ray appellant had minimal periarticular osteophyte formation and Pelligrini Steida calcification in his knee. He opined that appellant would benefit from a right knee reliever brace and repeat arthroscopic surgery, but opined that appellant's current condition was permanent.

The record also contained a December 16, 1997 radiologic report revealing a very small effusion but no other abnormality of the right knee and an unsigned medical progress note dated November 10, 1997 reporting that appellant had persistent pain on the right side of his knee, an effusion and tenderness along the medial margins of the knee. This progress note reported that at that time appellant lacked eight degrees range of motion from full extension. A brace was recommended.

On June 26, 1998 the Office referred Dr. Smith's report to the Office medical adviser for comment and it asked if there were any findings identified which would increase appellant's impairment rating beyond the four percent already awarded.

On June 29, 1998 Dr. David H. Garelick, the Office medical adviser, responded, noting that appellant had been awarded permanent impairment for both the pain emanating from the undersurface of the patella[5] and for the meniscal injury. He noted that Dr. Smith did not substantiate his 50 percent impairment rating with any objective evidence to support the award and that other examining physicians identified a relatively healthy knee, other than the residual patellofemoral pathology. Dr. Garelick found no objective basis for any additional impairment award.

By decision dated July 13, 1998, the Office denied modification of the prior schedule award finding that the evidence submitted in support was insufficient to warrant modification of the prior schedule award. The Office noted that Dr. Smith failed to explain how, by correctly using the A.M.A., *Guides*, he arrived at a 50 percent permanent impairment of appellant's right

[4] *See* 5 U.S.C. § 8127(a); 20 C.F.R. § 10.702 which provides that the representative may charge the claimant a fee and other costs associated with the representation and that "[t]he claimant is solely responsible for paying the fee and other charges," which will not be reimbursed by the Office, nor is the Office in any way liable for the amount of the fee.

[5] Dr. Garelick noted that upon surgical debridement in November 1996 appellant was found to have arthritis on the under surface of the patella covering approximately 30 percent, which he opined probably preexisted the work-related injury.

lower extremity. The Office further noted that Dr. Garelick found no objective basis for an additional award.

The Board finds that appellant has failed to established that he has greater than a four percent permanent impairment of his right lower extremity, for which he has received a schedule award.

A claimant seeking compensation under the Federal Employees' Compensation Act[6] has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.[7] Section 8107 of the Act and section 10.304 of the implementing federal regulation,[8] 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, organ or function.[9]

The schedule award provisions of the Act[10] specify the number of weeks of compensation to be paid for permanent loss of use of various members of the body. The Act does not, however, specify the manner in which the percentage loss of use of a member shall be determined. The method used in making such a determination is a matter that rests with the sound discretion of the Office.[11] 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.[12] The Office has adopted the A.M.A., *Guides* as the standard for evaluating permanent impairment for schedule award purposes and the Board has concurred with the Office's adoption of this standard.[13]

[6] 5 U.S.C. §§ 8101-8193.

[7] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[8] 20 C.F.R. § 10.304.

[9] 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).

[10] 5 U.S.C. § 8107.

[11] *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

[12] *Henry L. King*, 25 ECAB 39, 44 (1973); *August M. Buffa*, 12 ECAB 324, 325 (1961).

[13] *Donald Mueller*, 32 ECAB 324 (1980); *Anne E. Hughes*, 27 ECAB 106 (1975); *Theodore P. Richardson*, 25 ECAB 113 (1973).

The A.M.A., *Guides* standards for evaluating the impairment of extremities are based primarily on loss of range of motion.[14] However, all factors that prevent a limb from functioning normally, including pain or discomfort, should be considered, together with loss of motion, in evaluating the degree of permanent impairment.[15] The A.M.A., *Guides* provides a grading scheme and procedure for determining the impairment of an affected body part due to pain, discomfort, or loss of sensation.[16] The A.M.A., *Guides* also provides impairment ratings of the lower extremities for specific disorders of the knee, such as torn meniscus or meniscectomy.[17]

In this case, Dr. Smith reported a greater permanent impairment of the right lower extremity than that already awarded, ostensibly as a result of appellant's pain.[18] Board precedent is well settled, however, that when an attending physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based upon the correct application of the specific and pertinent sections, tables and/or figures of the A.M.A., *Guides*, the Office is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[19] Board cases are clear that if the attending physician does not properly utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment.[20]

In this case, Dr. Smith merely stated that he was referring generally to the A.M.A., *Guides*, but he failed to identify upon what section, table or figure he was basing his 50 percent impairment rating. Consequently, his opinion is of reduced probative value and is insufficient to establish that appellant has any greater right lower extremity impairment than that for which he has already received a schedule award. As the Office medical adviser correctly applied the A.M.A., *Guides*, his opinion remains the weight of the probative medical evidence.

On appeal appellant's representative also argues that appellant has a 20 percent whole body impairment. However, the Board notes that in *Gary L. Loser*,[21] it explained that there is no provision under the Act for providing schedule awards based on "whole man" estimates of physical impairment.

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

[15] *See Paul A. Toms*, 28 ECAB 403 (1987).

[16] A.M.A., *Guides*, Chapter 15, pp. 315-19; *see also* Chapter 3.2(l), p. 89 and Table 68.

[17] *Id*. Chapter 3, Table 36, p. 61.

[18] Dr. Smith failed to state exactly upon what he was basing the increased impairment, and no objective evidence of further impairment was identified.

[19] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

[20] *See Thomas P. Gauthier*, 34 ECAB 1060 (1983); *Raymond Montanez*, 31 ECAB 1475 (1980).

[21] 38 ECAB 673, 679 (1987).

As appellant has failed to present any objective medical evidence, based upon a correct application of the identifiable, pertinent sections of the A.M.A., *Guides*, that he has any greater than a 4 percent permanent impairment of his right lower extremity, he has not met his burden of proof to justify modification of the previously granted schedule award.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated July 13, 1998 and October 23, 1997 are hereby affirmed.

Dated, Washington, D.C.
May 24, 2000

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member