United States Department of Labor
Employees' Compensation Appeals Board

S.J., Appellant	)	
and	)	**Docket No. 06-1567**
	)	**Issued: January 24, 2007**
DEPARTMENT OF DEFENSE, DEFENSE FINANCE & ACCOUNTING SERVICE, Norfolk, VA, Employer	)	

Appearances:
Appellant, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument November 16, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 6, 2006 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated November 4, 2005 and May 9, 2006 which denied her claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination in this case.

ISSUE

The issue is whether appellant has met her burden of proof to establish that she has greater than a 15 percent impairment for each lower extremity for which she has received schedule awards.

FACTUAL HISTORY

This case has been before the Board previously. In a March 14, 2003 decision, the Board affirmed a July 8, 2002 decision in which the Office found that appellant was not entitled to a schedule award greater than the 15 percent for each lower extremity awarded on

October 9, 1999.[1] Subsequent to the Board's March 14, 2003 decision, appellant requested reconsideration on March 27 and October 10, 2003 and January 22, 2004.[2] In nonmerit decisions dated April 29 and October 31, 2003 and April 16, 2004, the Office denied appellant's reconsideration requests.

On June 24, 2003 Dr. Arthur W. Wardell, an attending Board-certified orthopedic surgeon, performed an additional partial lateral meniscectomy on appellant's right knee,[3] and in a November 21, 2003 report, noted that knee x-rays demonstrated a three millimeter cartilage interval bilaterally. He advised that, pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[4] for her right lower extremity under Table 17-5, appellant was entitled to a one percent impairment for an antalgic gait, under Table 17-31, a seven percent impairment for a three millimeter cartilage interval and under Table 17-33, a seven percent impairment for a total lateral meniscectomy. On January 10, 2005 appellant filed an additional schedule award claim. In an August 8, 2004 report, Dr. Wardell advised that, based on arthroscopic findings under the tables of the A.M.A., *Guides*, she had lower extremity impairment ratings of 40 percent on the right and 7 percent on the left. In a March 10, 2005 report, an Office medical adviser advised that maximum medical improvement had been reached on September 17, 1997 and that, under Table 17-33 of the A.M.A., *Guides*, for partial lateral meniscectomies, appellant was entitled to a two percent impairment rating for each lower extremity.

The Office determined that a conflict in medical evidence had been created between Dr. Wardell and the Office medical adviser and referred appellant to Dr. Michael Andrew Caines, also Board-certified in orthopedic surgery, who was provided a set of questions, the medical record and a statement of accepted facts. In an August 9, 2005 report, Dr. Caines noted the history of injury, his review of the record and physical findings. He advised that, under the fifth edition of the A.M.A., *Guides*, appellant had lower extremity impairment ratings of two percent each, based on bilateral partial meniscectomies, with a date of maximum medical improvement of September 7, 1997.

By decision dated September 23, 2005, the Office credited the opinion of Dr. Caines and found that appellant was not entitled to an additional schedule award. In a November 4, 2005 decision, the Office vacated the September 23, 2005 decision because it had determined that Dr. Caines was an associate of a former treating physician and thus could not serve as a referee examiner. The Office, however, found that there was no conflict in medical evidence because Dr. Wardell provided no specific analysis under the A.M.A., *Guides*. The Office again determined that appellant was not entitled to an additional schedule award.

[1] Docket No. 03-58 (issued October 9, 1999).

[2] The Board denied appellant's petition for reconsideration by order dated September 12, 2003.

[3] Appellant underwent partial lateral meniscectomies on July 5 and September 17, 1996 on the left and right knee respectively.

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

On February 16, 2006 appellant requested reconsideration and submitted additional treatment notes from Dr. Wardell and a February 10, 2006 report in which he advised that, under Table 15-18 of the A.M.A., *Guides*, she had a right lower extremity impairment rating of 10 percent for L4 radiculopathy and a 10 percent impairment for L5 radiculopathy; that using Table 17-8, she had 24 percent for Grade 4 weakness of flexion and extension and using Table 17-31, a 25 percent impairment for cartilage interval narrowing, to total 59 percent on the right. Dr. Wardell also advised that appellant was entitled to the same 25 percent on the left for cartilage interval narrowing and 24 percent for Grade 4 weakness of flexion and extension, to total 49 percent on the left. In an April 13, 2006 report, an Office medical adviser noted that the Office had not accepted a back condition as employment related and that Dr. Wardell's February 10, 2006 report was insufficient to establish that appellant was entitled to an additional schedule award. By decision dated May 9, 2006, the Office denied modification of the November 4, 2005 decision.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[5] and section 10.404 of the implementing federal regulation,[6] schedule awards are payable for permanent impairment of specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7] Chapter 17 provides the framework for assessing lower extremity impairments.[8]

If a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, he or she bears the burden of proof to establish a greater impairment causally related to the employment injury.[9] Before the A.M.A., *Guides*, can be utilized, a description of impairment must be obtained from the claimant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *See Joseph Lawrence, Jr.*, 53 ECAB 331 (2001); *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[8] A.M.A., *Guides* 523-64.

[9] *Edward W. Spohr*, 54 ECAB 806 (2003).

must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[10]

Office procedures indicate that referral to an Office medical adviser is appropriate when a detailed description of the impairment from the attending physician is obtained.[11] When a diagnosis-based impairment rating is applied, it is generally not appropriate to calculate additional impairment based on anatomic or functional based methods (such as limitations of strength or range of motion).[12] It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included. As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him." Conditions acquired subsequent to the employment injury are not to be considered in schedule award determinations.[13]

ANALYSIS

The Board finds that appellant has not established that she is entitled to a schedule award greater than the 15 percent awarded on October 9, 1999 for each lower extremity. In support of her claim for an increased schedule award, appellant submitted several reports from her attending orthopedic surgeon, Dr. Wardell. In a November 21, 2003 report, Dr. Wardell noted x-ray findings of three millimeter cartilage intervals and advised that, based on Table 17-31 of the fifth edition of the A.M.A., *Guides*, this entitled appellant to a 7 percent right lower extremity impairment rating, that under Table 17-5 her antalgic gait entitled her to a 1 percent impairment, and under Table 17-33, status post total lateral meniscectomy entitled her to a 7 percent impairment, to total a 15 percent right lower extremity impairment.

Table 17-2 of the A.M.A., *Guides* describes the types of impairment ratings that cannot be combined, including that gait derangement cannot be combined with a diagnosis-based estimate.[14] An impairment rating for arthritis, as found in Table 17-31 can, however, be combined with a diagnosis-based estimate.[15] Thus, in accordance with Table 17-31, appellant would be entitled to a seven percent right lower extremity rating for the three millimeter cartilage interval reported by Dr. Wardell on x-ray in his November 21, 2003 report. Dr. Wardell also advised that appellant was entitled to a seven percent impairment using Table 17-33 based on a total lateral meniscectomy. His operative report of June 24, 2003 stated, however, that appellant had a partial right knee meniscectomy and the surgeries performed in 1996 were also partial meniscectomies. The information in the operative report contains a more thorough and accurate medical history. In accordance with Table 17-33 appellant would, therefore, be entitled to an

[10] *Vanessa Young*, 55 ECAB 575 (2004).

[11] *Thomas J. Fragale*, 55 ECAB 619 (2004).

[12] A.M.A., *Guides* 545, section 17.2j; *Derrick C. Miller*, 54 ECAB 266 (2002).

[13] *See generally Michael C. Milner*, 53 ECAB 446 (2002).

[14] A.M.A., *Guides* 526.

[15] *Id.*

additional 2 percent right lower extremity impairment,[16] to total a 9 percent impairment, which is less than the 15 percent previously awarded. Dr. Wardell's November 21, 2003 report is, therefore, insufficient to establish that appellant is entitled to an increased schedule award.

Dr. Wardell also submitted an August 4, 2004 report. The Board finds that this report is of little probative value and insufficient to establish entitlement to an increased schedule award. In that report, Dr. Wardell offered a general statement that appellant was entitled to awards of 40 percent on the right and 7 percent on the left but without referencing specific figures or tables of the A.M.A., *Guides*.[17] A medical opinion not based on the A.M.A., *Guides* is of little probative value.[18] The Board therefore agrees with the Office's determination in its November 4, 2005 decision that there was no conflict in the medical evidence between Dr. Wardell's August 4, 2004 report and the March 10, 2005 opinion of the Office medical adviser.

In a February 10, 2006 report, Dr. Wardell advised that appellant had impairment ratings totaling 59 percent on the right and 49 percent on the left, explaining that she had right lower extremity impairments of 5 percent due to L4 radiculopathy and 5 percent due to L5 radiculopathy. The record, however, does not show that a lumbar spine condition has been accepted as employment related or that a lumbar spine condition preexisted the January 8, 1996 employment injury.[19] There is therefore no basis for including these conditions in determining an impairment rating.[20] Dr. Wardell also advised that, using Table 17-8, appellant had a bilateral 12 percent impairment for weakness of flexion and extension. Section 17.2e of the A.M.A., *Guides* provides that to be valid, if strength testing is made by one examiner, the measurements should be consistent on different occasions and Table 17-7 describes the criteria on which estimates and grades for lower extremity strength are based, with Table 17-8 listing the actual ratings for lower extremity weakness.[21] Dr. Wardell did not provide any explanation using the criteria found in Table 17-7 or other account of how he arrived at the Grade 4 weaknesses found in flexion and extension. His report is, therefore, insufficient to establish that appellant is entitled to an increased schedule award for either lower extremity based on weakness of flexion or extension.[22]

In his February 10, 2006 report, Dr. Wardell also advised that, using Table 17-31, appellant was entitled to a bilateral 25 percent impairment rating for cartilage interval narrowing. He, however, provided no x-ray support to show this degree of cartilage interval narrowing and Table 17-31 specifically states that the rating is determined by x-ray findings.[23] In his

[16] *Id.* at 544.

[17] *Mary L. Henninger*, 52 ECAB 408 (2001).

[18] *See Carolyn E. Sellers*, 50 ECAB 393 (1999).

[19] *See Michael C. Milner*, *supra* note 13.

[20] *See Tammy L. Meehan*, 53 ECAB 229 (2001).

[21] A.M.A., *Guides* 531, section 17.2e.

[22] *See Mary L. Henninger*, *supra* note 17.

[23] A.M.A., *Guides* 544.

August 21, 2003 report described above, Dr. Wardell specifically noted x-ray findings of bilateral three millimeter cartilage intervals which would entitle her to a 7 percent impairment, less than the 15 percent awarded. Because Dr. Wardell did not provide an x-ray report or reference x-ray findings in his February 10, 2006 report, it is insufficient to establish that appellant is entitled to an increased schedule award.

Both the Office medical adviser and Dr. Caines advised that appellant was entitled to a bilateral two percent impairment rating in accordance with Table 17-33 for her partial meniscectomies,[24] which is significantly less than the 15 percent previously awarded for each lower extremity. While appellant could be entitled to an additional impairment rating based on cartilage interval narrowing as described in Table 17-31, the record in this case does not support entitlement as she provided no x-ray report.

CONCLUSION

The Board finds that appellant has failed to establish that she is entitled to bilateral lower extremity impairment ratings greater than the 15 percent previously awarded.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 9, 2006 and November 4, 2005 be affirmed.

Issued: January 24, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[24] *Id.* at 546.