United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 08-183**
	)	**Issued: April 14, 2008**
DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, HILL AIR FORCE BASE, UT, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 9, 2007 merit decision concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues: (1) whether appellant met his burden of proof to establish that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award; and (2) whether the Office used a proper pay rate for appellant's schedule award compensation.

FACTUAL HISTORY

The Office accepted that on October 4, 2005 appellant, then a 48-year-old toolmaker, sustained a partial tear of the medial meniscus of his left knee.[1] The findings of the December 5,

[1] Appellant's weekly pay rate was $1,086.85 at the time of his October 4, 2005 injury.

2005 magnetic resonance imaging testing showed a complex medial meniscus tear of the left knee. On February 28, 2006 appellant underwent a partial medial meniscectomy of his left knee. The procedure was authorized by the Office.

Appellant stopped work after his surgery and returned to his regular work for the employing establishment on April 3, 2006. On November 14, 2006 he underwent a left knee chondroplasty of the patellofemoral joint and a prepatellar bursa incision. The procedure was authorized by the Office. Appellant stopped work on November 14, 2006 and the Office accepted that he sustained a recurrence of total disability starting that date.[2] He returned to limited-duty work in early January 2007.

In March 1 and April 25, 2007 reports, Dr. Douglas T. Shepherd, an attending Board-certified physical medicine and rehabilitation physician, indicated that on examination appellant had 130 degrees of left knee flexion and had normal strength and sensation in his left leg. He stated that appellant was not entitled to any impairment rating based on narrowing of the joint space of the left knee under Table 17-31 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) because recent x-rays did not show narrowing of the joint space which would qualify him for such a rating. Dr. Shepherd concluded that appellant had a two percent permanent impairment of his left leg due to the left partial medial meniscectomy of his left knee.

On October 5, 2007 an Office medical adviser indicated that he agreed with Dr. Shepherd that appellant had a two percent permanent impairment of his left leg.

In an October 9, 2007 award of compensation, the Office granted appellant a schedule award for a two percent permanent impairment of his left leg. The award ran for 5.76 weeks from March 1 to April 10, 2007 and totaled $4,828.68. It was based on appellant's weekly pay rate as of November 14, 2006 ($1,117.75) which was multiplied by the 75 percent compensation rate for employees with qualifying dependants to yield weekly compensation of $838.31.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] 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.[5] It is well

[2] On November 14, 2006 appellant's weekly pay rate was $1,117.75.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

established that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[6]

ANALYSIS -- ISSUE 1

The Office accepted that on October 4, 2005 appellant sustained a partial tear of the medial meniscus of his left knee. On February 28, 2006 appellant underwent a partial medial meniscectomy of his left knee. On November 14, 2006 he underwent a left knee chondroplasty of the patellofemoral joint and a prepatellar bursa incision.

In March 1 and April 25, 2007 reports, Dr. Shepherd, an attending Board-certified physical medicine and rehabilitation physician, properly concluded that appellant had a two percent permanent impairment of his left leg due to the left partial medial meniscectomy of his left knee.[7] He also properly determined that appellant was not entitled to any impairment rating based on narrowing of the joint space of the left knee under Table 17-31 because recent x-rays did not show narrowing of the joint space which would qualify him for such a rating.[8] On October 5, 2007 an Office medical adviser indicated that he agreed with Dr. Shepherd that appellant had a two percent permanent impairment of his left leg.

As the reports of the Dr. Shepherd and the Office medical adviser provided the only evaluation which conformed with the A.M.A., *Guides*, they constitute the weight of the medical evidence.[9] The Office properly determined that appellant has a two percent permanent impairment of his left leg and he has not shown that he has a greater impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[10] Section 8101(4) of the Act defines "monthly pay" for purposes of computing compensation benefits as

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[6] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[7] *See* A.M.A., *Guides* 546, Table 17-33.

[8] *Id.* at 544, Table 17-31. Moreover, there is no indication that such a process was caused by or preexisted the October 4, 2005 employment injury. *See supra* note 6 and accompanying text regarding the inclusion of preexisting impairments. Appellant would not be entitled to impairment ratings based on range of motion, strength or sensation deficits as examination showed that he had 130 degrees of left knee flexion and had normal strength and sensation in his left leg. *See* A.M.A., *Guides* 531-37, 550-53. There is no indication in the record that appellant had any additional impairment rating due to his November 14, 2006 surgery, nor does the A.M.A., *Guides* support such an additional rating.

[9] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).

[10] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[11]

ANALYSIS -- ISSUE 2

The record reflects that appellant sustained a recurrence of total disability on November 14, 2006. The Office properly used appellant's weekly pay rate at the time of this recurrence ($1,117.75) to calculate the amount of his October 9, 2007 schedule award as this recurrence occurred more than six months after he resumed full-time employment.[12] There is no indication that appellant sustained any later recurrences of disability which would have changed his pay rate prior to October 9, 2007. The Office properly multiplied the $1,117.75 figure by the 75 percent compensation rate for employees with qualifying dependants to yield weekly compensation of $838.31. It then properly calculated appellant's total compensation for the award by multiplying $838.31 times the 5.76 weeks the award ran.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a two percent permanent impairment of his left leg, for which he received a schedule award. The Board further finds that the Office used a proper pay rate for appellant's schedule award compensation.

[11] 5 U.S.C. § 8101(4). The Board has held that, if an employee has one recurrence of disability which meets the requirements of 8101(4), any subsequent recurrence would also meet such requirements and would entitle the employee to a new recurrence pay rate. *Carolyn E. Sellers*, 50 ECAB 393 (1999).

[12] *See supra* notes 10 and 11 and accompanying text. Appellant's weekly pay on November 14, 2006 was greater than his weekly pay on the date of injury.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 9, 2007 decision is affirmed.

Issued: April 14, 2008
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