

**United States Department of Labor
Employees' Compensation Appeals Board**

S.G., Appellant)
and) Docket No. 08-2053
U.S. POSTAL SERVICE, SE NEW ENGLAND) Issued: April 22, 2009
PERFORMANCE CLUSTER, Providence, RI,)
Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 21, 2008 appellant filed a timely appeal from an April 9, 2008 merit decision of the Office of Workers' Compensation Programs granting a schedule award and a July 10, 2008 nonmerit decision which denied his request for reconsideration. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than a two percent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 26, 2007 appellant, then a 47-year-old mail carrier, filed a traumatic injury claim alleging that on February 21, 2007 he slipped on ice and struck his left knee while in the performance of duty. The Office accepted left knee prepatellar bursitis, contusion and torn medial meniscus. Appellant underwent a left knee arthroscopic partial medial meniscectomy and

an open excision of the left prepatellar bursa on June 28, 2007. He returned to full-time modified duties on September 4, 2007 and full-duty work on October 11, 2007.

On October 9, 2007 appellant filed a Form CA-7 schedule award claim for his accepted left knee conditions.

In an October 16, 2007 letter, the Office requested that appellant's treating physician, Dr. J. Jeffrey Poggi, a Board-certified orthopedic surgeon, submit an impairment determination under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

In a November 7, 2007 letter, Dr. Poggi advised that appellant reached maximum medical improvement on October 1, 2007, three months status after his left knee surgery. During the October 1, 2007 evaluation, appellant described only mild discomfort when attempting to arise from a squatting position. On examination, Dr. Poggi found full range of motion of the left knee without discomfort. There was no tenderness to palpation about the knee and no instability. Appellant was neurologically intact in the left lower extremity and demonstrated excellent strength. Aggregate scar length was eight centimeters. Dr. Poggi released appellant to full-duty work without restrictions and no follow-up plans were made. He advised that appellant had no restrictions in range of motion or strength and, thus, no ratable impairment. However, appellant had three percent lower extremity impairment for residual discomfort when attempting to arise from a squatting position. Dr. Poggi further noted that appellant had an aggregate scar length of eight centimeters.

In a December 2, 2007 report, an Office medical adviser reviewed the report of Dr. Poggi and agreed that appellant reached maximum medical improvement on October 1, 2007. Pursuant to Table 17-33, page 546 of the A.M.A., *Guides*, he opined that appellant had two percent impairment of the left lower extremity on the basis of partial medial meniscectomy. The Office medical adviser noted that the A.M.A., *Guides* did not provide a basis on which to rate impairment for "residual discomfort when attempting to arise from a squatting position." He noted appellant's examination demonstrated full range of motion of the left knee without pain and no tenderness or instability about the left knee. The Office medical adviser also noted that appellant exhibited excellent strength and intact neurologic evaluation.

By decision dated April 9, 2008, the Office granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The award ran for 5.76 weeks October 1 to November 10, 2007.

In an April 22, 2008 letter, appellant requested reconsideration of the April 9, 2008 decision. He contended that he was not compensated for a lack of feeling on the left side of his knee or his scar. Appellant stated that his doctor informed him that some people do not regain feeling in the knee after surgery because nerves were cut.

By decision dated July 10, 2008, the Office denied appellant's request for reconsideration without conducting a merit review. It found appellant did not submit any additional relevant medical evidence or legal argument to establish that the rating of two percent of the left lower extremity was incorrect or to establish that he had greater impairment.

On appeal, appellant argued the Office failed to review Dr. Poggi's October 1, 2007 findings in determining the impairment to his left lower extremity.¹

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act² and its implementing regulations³ 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. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.⁴

In obtaining medical evidence for schedule award purposes, the Office must obtain an evaluation by an attending physician which includes a detailed description of the impairment including, where applicable, the loss in degrees of motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment. The description 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.⁵ If the attending physician has provided a detailed description of the impairment, but has not properly evaluated the impairment pursuant to the A.M.A., *Guides*, the Office may request that an Office medical adviser review the case record and determine the degree of impairment utilizing the description provided by the attending physician and the A.M.A., *Guides*.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that he has more than two percent impairment of the right leg. As a general rule in schedule award cases, the examining physician should describe the impairment in sufficient detail to permit clear visualization of the impairment and the restrictions and limitations that have resulted. On examination, Dr. Poggi found that appellant had no restriction in range of motion or loss of strength. He advised that appellant was neurologically intact in the left lower extremity. Dr. Poggi noted appellant had discomfort when attempting to arise from a squatting position. He rated three percent impairment for residual discomfort when arising from a squatting position. However, Dr. Poggi did not address how this

¹ On appeal, appellant submitted additional medical evidence. However, the Board may not review new evidence on appeal as its review is limited to the evidence that was before the Office at the time of its decisions. See 20 C.F.R. § 501.2(c).

² 5 U.S.C. §§ 8101-8193; see 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.404.

⁴ See *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

⁵ *Joseph D. Lee*, 42 ECAB 172 (1990).

⁶ *Paul R. Evans*, 44 ECAB 646 (1993).

impairment rating was derived in accordance with the A.M.A., *Guides*. The A.M.A., *Guides* provide protocols for rating pain or discomfort of the lower extremity at Chapter 17. Dr. Poggi did not explain or identify impairment due to any nerve deficit.⁷

In a December 2, 2007 report, the Office medical adviser rated permanent impairment pursuant to the A.M.A., *Guides*. Based on Dr. Poggi's examination findings, he found that appellant had two percent impairment of the left lower extremity pursuant to Table 17-33 page 546 of the A.M.A., *Guides*. Table 17-33 provides that a partial meniscectomy, medial or lateral, such as appellant underwent on June 28, 2007, represents two percent impairment of the left lower extremity. The Office medical adviser found no basis for rating additional impairment. He noted that appellant had a full range of motion of the left knee without pain, tenderness or instability. The Office medical adviser advised that examination findings revealed that appellant exhibited excellent strength and intact neurologic examination of the left knee.

The Board finds that the Office medical adviser based his impairment rating on a proper review of the record and appropriately applied the A.M.A., *Guides*. His report constitutes the weight of medical opinion and establishes that appellant has two percent impairment of the left lower extremity. Although appellant asserts that the Office did not properly consider Dr. Poggi's report, the Board notes that the Office medical adviser properly reviewed his examination findings in rating impairment based on the partial meniscectomy.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁸ Section 10.606(b)(2) of Office regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.⁹ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰ The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.¹¹ Likewise, it is well established that evidence which repeats or duplicates that already of record does not constitute a basis for reopening a case for merit review.¹²

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.a(2) (June 2003).

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ To the extent that Dr. Poggi's rating may have been made under Chapter 18, it is well established that physicians should not use this chapter to evaluate sensory deficit. See *Frnatz Ghassan*, 57 ECAB 349, 352 (2006).

¹¹ *Id.* at § 10.608(b).

¹² *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ANALYSIS -- ISSUE 2

In an April 22, 2008 letter, appellant disagreed with the Office's April 9, 2008 schedule award decision. The relevant issue in the case, whether he has more than two percent impairment of the left lower extremity, is medical in nature.

Appellant argued that his schedule award should include compensation for the lack of feeling on the left side of his knee as well as his scar. However, he did not submit any medical evidence to establish any sensory loss resulted in impairment of the leg pursuant to the A.M.A., *Guides*. Appellant's contention, in the absence of medical evidence, does not constitute a basis for reopening his claim for further merit review.

Appellant also argued that he has greater impairment due to scarring. However, under 5 U.S.C. § 8107(c)(21), a schedule award for disfigurement is limited to the face, head or neck. The Act makes no provision for scarring or disfigurement of any other part of the body. Neither the Office nor the Board has the authority to enlarge the terms of the Act or to make an award of benefits under any terms other than those specified in the statute or regulations.¹³ The record establishes that appellant sustained an eight centimeter scar located on his left knee. He is not entitled to an award for scarring or disfigurement of his leg.¹⁴ Therefore, appellant's argument does not constitute a basis for reopening his claim for merit review.

Consequently, appellant's request for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by the Office. As he did not meet any of the regulatory requirements, the Board finds that he is not entitled to further merit review.¹⁵

CONCLUSION

The Board finds appellant has no more than two percent permanent impairment to the left lower extremity, for which he received a schedule award. The Board further finds that the Office properly denied appellant's request for reconsideration.¹⁶

¹³ See *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁴ See *Richard T. DeVito*, 39 ECAB 668 (1988).

¹⁵ See *William Tipler*, 45 ECAB 185 (1993); *Norma Jean Polen*, 24 ECAB 64 (1972) (finding no award payable for disfigurement of the breast, abdomen, thighs or right arm).

¹⁶ See 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the July 10 and April 9, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 22, 2009
Washington, DC

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

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

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