United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 08-2196**
	)	**Issued: May 6, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Monroe, CT, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 6, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' March 21, 2008 schedule award decision and a July 1, 2008 decision denying his request for reconsideration without a merit review. Pursuant to 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 established more than two percent permanent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office properly denied appellant's request for reconsideration without a merit review.

FACTUAL HISTORY

On January 3, 2006 appellant, then a 35-year-old mail carrier, filed an occupational injury claim alleging that he sustained a partially torn meniscus with fluid and bone chips under his kneecap due to walking five miles a day for his mail route. He first realized his condition on August 1, 2005. Appellant did not stop work. Initial medical reports included an August 29,

2005 report from Dr. Patrick Kwok, a Board-certified orthopedic surgeon, which diagnosed left knee medial meniscal tear, left knee patellofemoral syndrome and left knee anterior cruciate ligament (ACL) laxity. In a December 19, 2005 report, Dr. Kwok opined that appellant's condition was employment related. The Office accepted the claim for left knee medial meniscus tear and authorized surgery.

On June 1, 2006 Dr. Kwok performed a left knee arthroscopy, medial meniscal repair. Appellant returned to limited-duty work on August 7, 2006 and was released to regular duty on November 2, 2006. In a February 19, 2007 report, Dr. Kwok diagnosed left knee medial meniscal tear, left knee ACL sprain and left knee chronic medial hamstring strain. He indicated that x-rays taken that day revealed no significant degenerative changes, bony abnormalities or subluxations. Dr. Kwok noted that left knee flexion was to 130 degrees, there was no significant crepitus and appellant had normal strength. He concluded that appellant had reached maximum medical improvement. Dr. Kwok opined that appellant had 10 percent impairment rating of the left lower extremity based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[1] as well as his clinical findings and judgment. He noted that appellant could return for treatment on an as-needed basis.

On June 20, 2007 appellant filed a claim for a schedule award. He subsequently submitted a February 6, 2008 report of Dr. Kwok noting his complaint of pain to the medial aspect of his knee with intermittent clicking. In a February 21, 2008 report, Dr. Kwok interpreted appellant's magnetic resonance imaging (MRI) scan results of his left knee revealing a horizontal tear involving the posterior horn, medial meniscus. He advised that a partial medial meniscectomy might be needed if appellant's symptoms persisted.

In a March 13, 2008 report, an Office medical adviser reviewed Dr. Kwok's reports and a statement of accepted facts. He agreed with Dr. Kwok's assertion that appellant reached maximum medical improvement on February 19, 2007. The Office medical adviser indicated that appellant had a two percent permanent impairment rating of the left lower extremity for partial medial meniscectomy according to page 546, Table 17-33 of the A.M.A., *Guides.*

By decision dated March 21, 2008, the Office issued appellant a schedule award for two percent permanent impairment of the left lower extremity. It paid him for 5.76 weeks from February 19 to March 31, 2007.

Appellant submitted an undated State of Connecticut form for rating permanent impairment, received on March 28, 2008 and signed by Dr. Kwok. The form indicated 10 percent permanent impairment of the left knee. It noted maximum medical improvement on February 19, 2007 and indicated that Dr. Kwok used the A.M.A., *Guides*.

In a letter dated March 28, 2008, and received by the Office on April 7, 2008, appellant requested reconsideration and noted that, as the impairment ratings from Dr. Kwok and the Office medical adviser were derived from the same book, there should not be a difference in the impairment rating. He also submitted a February 6, 2008 radiology consult form ordering a left

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[1] Hereinafter referred to as the A.M.A., *Guides* (5th ed. 2001).

knee MRI scan as well as a February 19, 2008 report of Dr. Noel Velasco, a Board-certified diagnostic radiologist, who noted preparing appellant's left knee for a subsequent MRI scan.

By decision dated July 1, 2008, the Office denied appellant's request for reconsideration finding that he did not submit relevant, pertinent new evidence or present an argument for error in fact of law.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations 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. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 for evaluating schedule losses and the Board has concurred in such adoption.[3]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a left knee medial meniscus tear and authorized his June 1, 2006 left knee arthroscopy to repair his medial meniscus. He filed a claim for a schedule award on June 20, 2007. On February 19, 2007 appellant's treating physician, Dr. Kwok, evaluated him to determine the extent of his permanent impairment of his left lower extremity. He found that appellant had reached maximum medical improvement. Dr. Kwok also found 10 percent impairment of the left lower extremity. He indicated that his findings were based on his clinical findings, clinical judgment and the A.M.A., *Guides*. However, Dr. Kwok did not explain how he applied the tables and pages of the A.M.A., *Guides* to his findings or otherwise explain how he calculated the percentage of impairment derived pursuant to the A.M.A., *Guides*.[4]

After receiving Dr. Kwok's report, the Office properly referred the matter to its Office medical adviser.[5] The Office medical adviser reviewed Dr. Kwok's findings and evaluated appellant's impairment of the left lower extremity. He applied findings derived from

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[2] 5 U.S.C. §§ 8101-8193. *See* 5 U.S.C. § 8107.

[3] *See* 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ___ (Docket No. 07-379, issued October 2, 2007).

[4] *See Tonya D. Bell*, 43 ECAB 845 (1992) (where the Board held that an opinion is of little probative value where the physician does not explain how he derived such an impairment rating or whether it was ascertained by using the appropriate standards of the A.M.A., *Guides*).

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002); *L.H.*, 58 ECAB ___ (Docket No. 06-1691, issued June 18, 2007) (the Act's procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*).

Dr. Kwok's reports to Table 17-33 on page 546 of the A.M.A., *Guides,* for partial medial meniscectomy. The Board notes that Table 17-33 provides for two percent impairment for the lower extremity for a partial medial meniscectomy. The Office medical adviser also explained that, upon reviewing the medical record, the examination findings did not indicate that appellant had any varus or valgus instability and that his range of motion to flexion was normal. The medical adviser did not indicate any other basis on which permanent impairment could be rated under the A.M.A., *Guides*.

The Board finds that the Office medical adviser properly determined appellant's permanent impairment. There is no other medical evidence, consistent with the A.M.A., *Guides*, showing that appellant has greater than two percent impairment of the left lower extremity. Accordingly, the medical evidence establishes that appellant has no more than two percent left lower extremity impairment.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a), the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[6] Section 10.608(b) of Office regulations provide 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.[7]

ANALYSIS -- ISSUE 2

Appellant's request for reconsideration consisted of a letter asserting that the Office medical adviser should not have derived a different impairment rating as he and Dr. Kwok both relied on the A.M.A., *Guides* to determine the percentage of left lower extremity impairment. However, his assertion does not establish an erroneous application or interpretation of the law or a relevant legal argument not previously considered. The fact that both physicians referred to the A.M.A., *Guides* and derived different impairment ratings does not, by itself, demonstrate error by the Office. Rather, it was the Office medical adviser's use of a particular provision of the A.M.A., *Guides*, and Dr. Kwok's failure to explain his calculation under the A.M.A., *Guides* that accounted for the difference in the impairment rating.

Appellant also submitted a form report from Dr. Kwok that indicated he had 10 percent left leg impairment. While this report is new, it is not relevant as it is essentially repetitive of Dr. Kwok's February 19, 2008 report that also found that appellant had 10 percent impairment. The form report did not provide any additional information regarding how the impairment was rated pursuant to the A.M.A., *Guides*. The submission of evidence which repeats or duplicates

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[6] *D.K.*, 59 ECAB ___ (Docket No. 07-1441, issued October 22, 2007).

[7] *K.H.*, 59 ECAB ___ (Docket No. 07-2265, issued April 28, 2008).

evidence already in the case record does not constitute a basis for reopening a case.[8] Additionally, appellant submitted a radiology consult form ordering a left knee MRI scan and a report from Dr. Velasco. As neither of these reports addressed the pertinent issue of whether appellant had more than a two percent permanent impairment of the left lower extremity, the evidence was not relevant to the particular issue involved and thus did not warrant a reopening of the case for merit review.[9]

Consequently, the Office properly denied appellant's request for reconsideration without a merit review.[10]

CONCLUSION

The Board finds that appellant has no more than a two percent left lower extremity impairment. The Board further finds that the Office properly denied appellant's request for reconsideration without a merit review.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated July 1 and March 21, 2008 are affirmed.

Issued: May 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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[8] *Roger W. Robinson*, 54 ECAB 846 (2003).

[9] *See E.M.*, 60 ECAB ___ (Docket No. 09-39, issued March 3, 2009) (where the Board held that new evidence submitted upon a reconsideration request that does not address the pertinent issue is not relevant evidence); *Freddie Mosley*, 54 ECAB 255 (2002).

[10] On appeal, appellant submitted additional medical evidence. However, the Board may not consider such evidence for the first time on appeal as its review is limited to the evidence that was before the Office at the time of its decision. *See* 20 C.F.R. § 501.2(c).