

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

E.D., Appellant)
)
and)
)
DEPARTMENT OF THE TREASURY,)
INTERNAL REVENUE SERVICE,)
Memphis, TN, Employer)

**Docket No. 10-967
Issued: January 7, 2011**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2010 appellant, through her representative, filed a timely appeal from a November 13, 2009 decision of the Office of Workers' Compensation Programs denying his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that he sustained employment-related permanent impairment of his left leg.

On appeal appellant, through his attorney, contends that the Office's decision denying a schedule award is contrary to fact and law.

FACTUAL HISTORY

On June 11, 2008 appellant, then a 44-year-old mail and file clerk, filed a traumatic injury claim alleging that while pulling a cart he injured his left kneecap. On July 17, 2008 he

underwent a fluoroscopy of the left knee with microfracture of the lateral condyle. On August 18, 2008 the Office accepted appellant's claim for tear of the medial meniscus of the left knee. On October 16, 2008 appellant underwent a left knee arthroscopic chondroplasty.

In a February 13, 2009 report, Dr. Kenneth Grinspun, an attending Board-certified orthopedic surgeon, noted that appellant was discharged and had reached maximum medical improvement. He advised that appellant was ambulating without a limp, had full range of motion, no quad atrophy and excellent quad strength. Dr. Grinspun stated that this was a very complex case regarding rating any permanent impairment. Appellant gave good effort during the functional capacity and had what appeared to be an acute chronic injury to his knee. At the time of his first surgery, there were two small cartilaginous pieces floating in the knee that were not consistent with an acute injury. Dr. Grinspun noted that a second look surgery confirmed that the microfracture had filled in the cartilage nicely. He stated that after "thoughtful deliberation" it was unlikely that appellant's initial injury was work related. Dr. Grinspun did not provide any impairment rating.

On April 6, 2009 appellant filed a claim for a schedule award. In a letter from appellant's attorney on the same date, he indicated that he was submitting an impairment rating from Dr. Grinspun to support the claim. He attached a previously submitted report dated November 8, 2008 in which Dr. Grinspun provided a functional capacity evaluation for internal derangement of appellant's right knee. Dr. Grinspun noted complaints of pain in the left knee which increased when performing handling activities. He listed findings on active range of motion but did not provide any rating of impairment.

By memorandum dated April 27, 2009, the Office asked the Office medical adviser to review appellant's record and make a recommendation for schedule award purposes. In a response that date, the Office medical adviser noted that appellant had arthroscopic surgery performed on July 17, 2008 and that an October 16, 2008 report revealed an intact medial meniscectomy. He also noted that a chondroplasty was performed and that a meniscectomy was not performed. The Office medical adviser rated the statement by Dr. Grinspun that on February 17, 2009 appellant had zero percent impairment of the left extremity and agreed with this finding. He concluded that appellant had no permanent impairment of his left lower extremity.

On April 28, 2009 the Office issued a decision denying appellant's claim for a schedule award as the evidence was not sufficient to establish that he sustained any permanent impairment of his left leg.

By letter dated May 5, 2009, appellant, through his attorney, requested a telephonic hearing. At the hearing held on August 13, 2009 appellant noted that he had returned to work in a different position and could not perform the physical duties of his prior job lifting and loading. The hearing representative agreed to hold the record open for 30 additional days for the submission of additional medical evidence. No new medical evidence was submitted.

By decision dated November 13, 2009, the hearing representative affirmed the April 28, 2009 decision denying appellant's claim for a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,¹ and its implementing federal regulations,² 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.³ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁴ For decisions issued after May 1, 2009, the sixth edition will be used.⁵

It is the claimant's burden to establish that he or she has sustained a permanent impairment of the scheduled member or function as a result of any employment injury.⁶ Office procedures provide that, to support a schedule award, the file must contain probative medical evidence which establishes that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail so that it can be visualized on review and computes the percentage of impairment in accordance with the A.M.A., *Guides*.⁷

ANALYSIS

The Office accepted that appellant sustained a work-related tear of the medial meniscus of the left knee. After appellant underwent surgeries on his left knee, he filed a claim for a schedule award. The Board notes that Office procedures provide that maximum medical improvement must be reached before a schedule award can be made.⁸ In this case, Dr. Grinspun found that appellant reached maximum medical improvement as of February 13, 2009; however, he advised that appellant was ambulating without a limp, had a full range of motion, no quad atrophy and excellent quad strength. He did not provide any permanent impairment rating for the left knee. The Office forwarded the medical evidence to the Office medical adviser for review. The Office medical adviser reviewed Dr. Grinspun's reports and concluded that appellant had no impairment of his left lower extremity.

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404.

³ *Id.* at § 10.404(a)

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁵ *Id.* at Exhibit 1 (January 2010).

⁶ *Tammy L. Meehan*, 53 ECAB 229 (2001).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(b) (January 2010).

⁸ *See id.* at Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(1) (October 1990).

The record does not provide any medical opinion finding that appellant sustained permanent impairment to his left leg as a result of his employment injury. The Board finds that the Office properly denied his claim for a schedule award.

CONCLUSION

The Board finds that appellant is not entitled to a schedule award for his left knee injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2009 is affirmed.

Issued: January 7, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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