United States Department of Labor
Employees' Compensation Appeals Board

DENISE L. CROUCH, Appellant	)	
	)	**Docket No. 04-1905**
and	)	**Issued: October 21, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO, Employer	)	

Appearances:
Daniel Z. Lefton, Esq., for the appellant
Jim Gordon, Esq., for the Director

Oral Argument July 5, 2005

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2004 appellant timely filed an appeal from an April 22, 2004 decision by a hearing representative of the Office of Workers' Compensation Programs who found a two percent impairment of her leg and that she could not claim her son as a dependent. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether appellant has more than a two percent permanent impairment of the left leg; and (2) whether her son is a dependent as defined by the Federal Employees' Compensation Act.

FACTUAL HISTORY

On June 20, 2001 appellant, then a 50-year-old food server, slipped on a greasy floor and fell, landing on her left knee. In a July 10, 2001 report, Dr. Dale E. Doerr, a Board-certified orthopedic surgeon, stated that appellant underwent a magnetic resonance imaging (MRI) scan

which showed a subtle medial meniscus tear. He restricted her to working only while sitting. In an August 5, 2001 letter, the Office accepted appellant's claim for a tear of the medial meniscus in the left knee. On August 16, 2001 appellant underwent arthroscopic surgery for a partial medial meniscectomy.

In a September 25, 2001 letter, appellant's attorney submitted a copy of the enrollment of appellant's son at Harcourt High School where he was in the process of earning his General Graduate Equivalency Diploma (GED). He indicated that appellant had been working at a second job as a food server and requested that her wages from that job be included in calculating her compensation benefits. The attorney submitted the job description from appellant's second job and a tuition protection agreement with Harcourt High School which indicated that the school consisted of independent study correspondence courses taken at home. In an October 3, 2001 letter, the Office stated that, as appellant's son was seeking a GED, he was not attending high school or college under the Act. Therefore, appellant was entitled to compensation only at the statutory two thirds rate of her pay, not the three fourths rate to which she would be entitled if her son was a dependent as defined by the Act.

In a November 1, 2001 letter, counsel asked the Office to reconsider its refusal to find appellant's son as a dependent and its denial to include appellant's earnings from her second job in determining the amount of compensation she should receive. He stated that appellant was not released to work at her second job until October 16, 2001. Appellant's attorney noted that she had a weekly wage of $138.18 at her second job. The Office sent appellant a form to complete on her son's educational status. In a November 14, 2001 letter, the Office stated that it could not include the pay from appellant's second job in computing her compensation.

In an October 16, 2001 report, Dr. Doerr stated that appellant had a good range of motion in the knee but lacked approximately 10 degrees of full flexion. In a July 30, 2002 report, he stated that appellant had no complaints of pain or swelling. Dr. Doerr noted that appellant had a 150-degree range of motion in the left knee. He concluded that appellant had reached maximum medical improvement. Dr. Doerr commented that appellant did not have any permanent impairment related to range of motion or strength but had a five percent permanent impairment due to the partial meniscus tear and partial meniscectomy.

The Office referred appellant to Dr. Shawn L. Berkin, an osteopath, for an evaluation and second opinion on the extent of any permanent impairment of the left leg. In an April 23, 2003 report, he noted that appellant complained of pain and tenderness of the left knee which was aggravated by walking up stairs. Dr. Berkin found no swelling in the knee or joint effusion. He indicated that appellant had tenderness along the medial and lateral joint lines below the patella extending over the medial and lateral surfaces of the left knee at the level of tibial plateau. Dr. Berkin found no instability in the knee. He stated that appellant's range of motion in the left knee was 140 degrees in flexion and 0 degrees in extension. Dr. Berkin concluded that appellant's fall at work in June 2001 was a substantial factor in causing the medial meniscus tear in the left knee. He used a diagnosis-based estimate to conclude that appellant had a one percent permanent impairment of the whole body due to the torn meniscus and meniscectomy. He indicated that appellant did not have any permanent impairment due to the range of motion in her left knee. Dr. Berkin found no other factors that would contribute to the extent of appellant's

permanent impairment. He concluded that appellant had a one percent permanent impairment of the whole body due to her employment injury.

In a July 7, 2003 letter, counsel advised that appellant experienced continued muscle spasms, leg cramps, stiffness in the knee joint and pain in the left leg. He noted that she also had swelling in her knee that was brought about by changes in the weather. Appellant's counsel contended that appellant should receive a schedule award for a 30 percent permanent impairment of the left leg. He added that appellant's son was enrolled in an accredited school, licensed by the Pennsylvania State Board of Private Licensed Schools and had turned 23 on January 28, 2003 while he was still enrolled in the program. He contended that, since appellant's son was a student and dependent on her, the compensation rate should be three fourths of her average monthly earnings.

The Office referred appellant to Dr. John A. Gragnani, a Board-certified physiatrist, for an examination. In an August 4, 2003 report, he indicated that he had examined appellant for an impairment rating. Dr. Gragnani reported that appellant's chief complaints were aching in the left knee when it was cold, some soreness and muscle spasm and cramping in the calf of the left leg. He noted that appellant was not working under any physical restrictions. Dr. Gragnani stated that there was no crepitus or fluid in the knee. He found good stability of the medial and lateral collateral ligaments. Dr. Gragnani indicated that strength in appellant's knee was normal. He reported that appellant had flexion to 126 degrees, 0 degrees of extension and 4 degrees valgus. Dr. Gragnani noted that knee circumferences were 35 centimeters on the left and 33.5 centimeters on the right. He diagnosed a torn medial meniscus of the left knee and residual pain complaints. Dr. Gragnani found that appellant had reached maximum medical improvement in August 2002 and that she had a two percent permanent impairment of the right knee due to the partial meniscectomy. Dr. Gragnani indicated that appellant did not have any permanent impairment due to loss of motion and no substantial sensory change or pain complaints.

In an August 6, 2003 memorandum, an Office medical adviser noted that Dr. Gragnani dismissed range of motion, chronic pain and sensory change, and chronic weakness as factors of permanent impairment. He noted that Dr Gragnani determined, based on the partial meniscectomy, that appellant had a two percent impairment of the left leg. He concluded that this rating was acceptable.

In an August 12, 2003 decision, the Office granted a schedule award for a two percent permanent impairment.

In an August 19, 2003 letter, counsel requested a hearing before an Office hearing representative. At the January 30, 2004 hearing, appellant testified that she could only walk two blocks before she began feeling pain in the left knee and that walking up steps was very painful. Appellant indicated that she could stand for an hour before pain recurred in the left knee. She stated that she lost three months of work from her second job due to the employment injury. Counsel argued that appellant's son should be considered a dependent for compensation purposes.

In an April 22, 2004 decision, the Office hearing representative affirmed the August 12, 2003 schedule award. She also found that appellant's son was not a dependent, stating that

enrollment in a correspondence course was insufficient to establish entitlement to augmented compensation. The Office hearing representative remanded the case for a determination of whether the job appellant held at the time of injury would have provided her with work for 11 months.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[1] and its implementing regulation[2] sets 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[3]

ANALYSIS -- ISSUE 1

Dr. Doerr stated that appellant had a five percent permanent impairment of the left leg due to the meniscal tear and the partial medial meniscectomy. However, he made no reference to the A.M.A., *Guides* to support his conclusion that a partial medial meniscectomy is equal to a five percent permanent impairment. Dr. Berkin concluded that appellant had a one percent permanent impairment of the whole person due to the partial meniscectomy. Under the A.M.A., *Guides*, this is equivalent to a two percent permanent impairment of the leg.[4] Dr. Gragnani also found that appellant had a two percent permanent impairment of the left leg due to her partial meniscectomy. Both Dr. Berkin and Dr. Gragnani concurred in their calculations of appellant's permanent impairment of the left leg. Under the A.M.A., *Guides*, a partial medial meniscectomy represents a two percent permanent impairment of the leg.[5] Although appellant also had some loss of flexion in the left knee, she is not entitled to any impairment rating as the A.M.A., *Guides* provides a permanent impairment rating based upon a diagnosis-based estimate (meniscectomy) cannot be combined with a loss of range of motion evaluation.[6] Appellant is either entitled to a schedule award for the meniscectomy or the loss of range of motion, not both. Since appellant's retained flexion of the knee was greater than 110 degrees and flexion is only ratable if it is less than 110 degrees, appellant would not be entitled to an award for the loss of flexion of the knee.[7]

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[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (1999).

[3] *Id*.

[4] *Id.* at p. 527, Table 17-3.

[5] *Id.* at pp. 546-47, Table 17-33.

[6] *Id*. at p. 526, Table 17-2.

[7] *Id.* at p. 537, Table 17-10.

Although appellant complained of pain in the knee after standing for one hour, walking two blocks or climbing stairs, none of the physicians of record found that her pain was sufficiently severe to represent an impairment of the leg.

Appellant's counsel argued on appeal that the Office hearing representative failed to take into account appellant's pain, her age and her inability to hold employment after the employment injury in the calculation of the schedule award. He contended that appellant was entitled to an equitable award of 30 percent impairment of the leg. The medical record in this case, however, does not establish that appellant's pain has contributed to the permanent impairment of the leg. As for the issues of appellant's age and inability to work, section 8107 of the Act was intended by Congress to only apply to cases in which federal employees sustain a permanent impairment of a listed member of the body due to an employment injury.[8] The provisions for schedule awards are separate from any factors that would be used to determine disability based on wage loss.[9] The amounts payable pursuant to a schedule award are defined by weeks of compensation for the listed schedule members. Section 8107 does not take into account the effect the impairment may have on employment opportunities, sports, hobbies or other lifestyle activities.[10] Counsel's argument for an "equitable" schedule award must be denied as 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 these specified in the Act.[11]

LEGAL PRECEDENT -- ISSUE 2

Section 8110 of the Act provides that a claimant is entitled to augmented compensation to three fourths of the employee's rate of monthly pay if he or she has a dependent.[12] This section provides that a dependent include an unmarried child under 18 years of age while living with the claimant or receiving regular contributions toward his or her support. The Act provides that compensation will continue at the augmented rate if the child has reached 18 years of age and is a student. Section 8101(17) of the Act defines a student as a individual under 23 years of age who has not completed four years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at a school, college or university or other educational or training institute an additional type of educational or training institute as defined by the Secretary. The federal regulations provide that an additional type of educational or training institute means a technical, trade, vocational, business, or professional school accredited or licensed by the federal or a state government, that provides courses of not less than three months' duration and prepares the individual for a livelihood in a trade, industry, vocation or profession.[13]

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[8] 5 U.S.C. § 8107.

[9] *See Harry D. Butler*, 43 ECAB 859, 863-64.

[10] *See Ruben France*, 54 ECAB ___ (Docket No. 02-2194, issued March 21, 2003); *Timothy J. McGuire*, 34 ECAB 189 (1982).

[11] *See Gary M. Goul*, 54 ECAB ___ (Docket No. 03-1235, issued July 14, 2003).

[12] 5 U.S.C. § 8110.

[13] 20 C.F.R. § 10.5(aa)(1).

ANALYSIS -- ISSUE 2

The records reflects that appellant's son was enrolled in a correspondence program as of July 23, 2001 for purposes of obtaining his GED. The evidence reflects that, although accredited with the state of Pennsylvania, the program offered independent study allowing students to work at their own pace with up to three years to complete the program. There is insufficient evidence that the Hart Court Learning Program constitutes the full-time pursuit of a course of study as is required under section 8101(17). Appellant therefore cannot claim her son as a dependent because the independent study allowed by the correspondence school does not meet the full-time requirement of the Act.

CONCLUSION

The Board finds that appellant has no more than a two percent permanent impairment of the left leg. Further, finds that appellant's son does not qualify as a dependent under the Act and therefore she is not entitled to augmented compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs, dated April 22, 2004, is hereby affirmed.

Issued: October 21, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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