

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of GARY N. JOHNSON and DEPARTMENT OF THE AIR FORCE,  
AIR LOGISTICS CENTER, McCLELLEN AIR FORCE BASE, Calif.

*Docket No. 97-2902; Submitted on the Record;  
Issued March 12, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant is entitled to compensation for totally disability after April 11, 1996; and (2) whether appellant has more than four percent permanent impairment of his right leg for which he received a schedule award.

The Board has duly reviewed the case on appeal and finds that appellant is not entitled to compensation for total disability after April 4, 1996.

Appellant filed a claim on October 2, 1995 alleging that he injured his knee on September 29, 1995. The Office of Workers' Compensation Programs accepted appellant's claim for right knee strain. Appellant returned to limited-duty work on October 23, 1995. Appellant filed a claim on April 5, 1996, alleging on April 4, 1996 he sustained additional injury to his right knee. The Office granted appellant's continuation of pay on April 5 and 8, 1996 and accepted his claim for temporary aggravation of right knee arthritis. Appellant requested wage-loss compensation through April 30, 1996. Appellant retired on April 30, 1996. By decision dated February 7, 1997, the Office denied appellant's claim for compensation. Appellant requested wage-loss compensation through January 15, 1997. By decision dated May 22, 1997, the Office denied appellant's claim for compensation from May 1, 1996.<sup>1</sup>

An employee seeking benefits under the Federal Employee's Compensation Act<sup>2</sup> has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that the individual is an "employee of the United States" within the meaning of the Act and that the claim was timely filed within the

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<sup>1</sup> Following the Office's May 22, 1997 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup>

In support of his claim for total disability on and after April 4, 1996, appellant submitted several medical reports from Dr. Susan Scholey, a physician Board-certified in physical medicine and rehabilitation. Dr. Scholey first examined appellant on April 5, 1996 and diagnosed right knee arthritis and patellofemoral syndrome. She indicated that appellant could return to modified work on April 5, 1996 and regular work on April 19, 1996. Dr. Scholey stated appellant should engage in modified duty with intermittent stair climbing in addition to his previous restrictions. She examined appellant on April 8, 1996 and diagnosed right knee arthritis and patellofemoral syndrome. Dr. Scholey indicated that appellant could return to limited-duty work on April 8, 1996 and estimated that appellant could return to full duty on April 29, 1996. Dr. Scholey stated that in addition to appellant's previous restrictions, he was not to climb stairs.

Dr. Scholey completed a form report on April 11, 1996 and noted appellant's history of injury. She stated that appellant requested to be removed from work alleging that the employing establishment was not adhering to his work restrictions. Dr. Scholey stated that she declined to write appellant "off-work" and repeated her findings that appellant could return to light duty on April 8 and regular work on April 29, 1996.

Dr. Gulabdas D. Hariyani, an orthopedic surgeon, completed a form report and indicated that appellant should not climb stairs until April 21, 1996.

The employing establishment submitted copies of appellant's limited-duty job restrictions on March 28 and April 11, 1996. The April 11, 1996 restrictions included no ascending or descending of stairs. As the medical reports from Dr. Hariyani and Dr. Scholey indicate that appellant could return to work with the additional restriction of no stair climbing on April 5, 1996 and as the record indicates that the employing establishment provided him with work within that restrictions on April 11, 1996, appellant has not established that he was totally disabled after April 11, 1996.

Dr. Christopher Sweeny, a Board-certified orthopedic surgeon, reported appellant's complaints of right knee pain on July 23, 1996. He stated that work activities bothered appellant's knee and that appellant experienced significant problems walking up stairs. He noted that appellant had retired and that appellant's knees did not bother him with such a low level of activity. Dr. Sweeny stated, "I expect ... if he were to return to those types of activities such as he was doing at work, probably his pain levels would increase once again." This report is not sufficient to meet appellant's burden of proof, as Dr. Sweeny did not provide an opinion that appellant was totally disabled for work on or after April 11, 1996. Instead he indicated that appellant's condition could be affected by his employment. The Board has held that fear of future injury is not compensable.<sup>4</sup>

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<sup>3</sup> *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

<sup>4</sup> *Louise G. Malloy*, 45 ECAB 613 (1994).

In a report dated January 15, 1997, Dr. Sweeny diagnosed chronic musculoskeletal problems, including right knee old posterior cruciate ligament tear. He did not address appellant's disability for work.

As appellant has submitted no medical evidence establishing that he was totally disabled for work on or after April 11, 1996, the date the employing establishment provided him with a light-duty position consistent with his restrictions, he has failed to meet his burden of proof and is not entitled to further compensation benefits after that date.

The Board further finds the issue of whether appellant has more than four percent permanent impairment of his right lower extremity for which he received a schedule award is not in posture for decision.

On September 4, 1996 appellant, filed a claim requesting a schedule award due to permanent impairment of his right lower extremity. By decision dated February 6, 1997, the Office granted appellant a schedule award for four percent impairment of his right lower extremity.

Section 8107 of the Act<sup>5</sup> provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function. Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*<sup>6</sup> as a standard for evaluating schedule losses and the Board has concurred in such adoption.<sup>7</sup>

In support of his claim for a schedule award, appellant submitted a report from Dr. Sweeny dated November 26, 1996. Dr. Sweeny stated appellant reached maximum medical improvement on July 23, 1996. He found appellant had mild pain, when sedentary increasing to moderate with any activity. He provided appellant's range of motion as flexion 130 degrees and extension minus 3 degrees. Dr. Sweeny found no ankylosis and no atrophy. He stated, "The right knee has a posterior cruciate ligament tear. There is positive posterior drawer, positive posterior sag and posterior quad(iceps) active test in the right knee. There is no rotary instability." He also found that appellant had intra-articular degenerative disease affecting his cartilage and causing bony osteophytes.

As Dr. Sweeny did not correlate his findings with the A.M.A., *Guides*, the Office properly referred his report to an Office medical adviser.<sup>8</sup> In a report dated December 10, 1996, the Office medical adviser, reviewed Dr. Sweeny's report and applied the A.M.A., *Guides*. He

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8107.

<sup>6</sup> A.M.A., *Guides* 4th ed. (1993).

<sup>7</sup> A. George Lampo, 45 ECAB 441, 443 (1994).

<sup>8</sup> Paul R. Evans, Jr., 44 ECAB 646 (1993).

found that appellant had pain interfering with activity, for 60 percent of the femoral nerve value of 7 percent or 4 percent impairment due to pain.<sup>9</sup> The Office medical adviser determined that flexion of 130 degrees and extension of 3 were not ratable impairments under the A.M.A., *Guides*.<sup>10</sup>

In his reports dated October 23, 1995, November 26, 1996 and January 15, 1997, Dr. Sweeny noted appellant's prior right knee problems due to a motor vehicle or bicycle accident, which resulted in a posterior cruciate ligament tear in his right knee. Dr. Sweeny listed his findings relating to this condition on November 26, 1996. The Office medical adviser stated that he found no evidence that appellant's posterior ligament instability was related to or aggravated by appellant's accepted employment injuries and did not consider this impairment in reaching appellant's schedule award. In a memorandum to the case record, an Office claims examiner stated that it was possible that appellant was entitled to an additional schedule award for the right leg due to posterior ligament instability.

The Office's procedures require that any previous impairment to the member under consideration is included in calculating the schedule award unless the prior impairment is due to a previous employment injury or the Department of Veterans' Affairs has paid the claimant for permanent impairment to the scheduled member.<sup>11</sup> On remand, the Office should determine whether appellant's posterior cruciate ligament tear falls within one of these exceptions and if not, include any impairment rating under the A.M.A., *Guides* due to this injury in calculating appellant's schedule award.

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<sup>9</sup> A.M.A., *Guides*, 48, Table 11; 89, Table 68.

<sup>10</sup> *Id.*, 78, Table 41.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7(2) (March 1995).

The decisions of the Office of Workers' Compensation Programs dated May 22 and February 7, 1997 are hereby affirmed as modified to reflect that appellant is entitled to compensation through April 11, 1996. The decision dated February 6, 1997 regarding appellant's schedule award is remanded for further development consistent with this decision.

Dated, Washington, D.C.  
March 12, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member