United States Department of Labor
Employees' Compensation Appeals Board

HOWARD WESTON, Appellant	)	
	)	**Docket No. 04-452**
and	)	**Issued: June 1, 2004**
PEACE CORPS, Dominican Republic, Employer	)	

Appearances:
Howard Weston, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 8, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 10, 2003 wherein the Office issued a schedule award for 60 percent impairment of the left lower extremity based on a weekly pay rate of $342.77. 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 more than a 60 percent impairment of the left lower extremity for which he received a schedule award; and (2) whether the Office properly determined appellant's rate of pay for compensation purposes.

FACTUAL HISTORY

On October 10, 1986 appellant, then a 26-year-old Peace Corps volunteer, injured his left leg in a transit accident while in the Dominican Republic. Dr. A. Lebron-Berges diagnosed appellant with comminute fracture of left tibial plateau, fracture of the point of insertion of anterior cruciate ligament, probable fracture of anterior horn of left meniscus and abrasion of left

knee. Appellant was evacuated to the United States, where he was treated by Dr. Jerry A. Lubliner, a Board-certified orthopedic surgeon. He was medically separated from the Peace Corps effective November 15, 1986. Appellant's claim was accepted for a comminuted fracture of the left tibial plateau. He underwent postsurgical repair of fractured left meniscus and torn left cruciate ligament.

In an attending physician's report dated December 19, 2002, Dr. Arnold B. Wilson, a Board-certified orthopedic surgeon, noted that appellant had advanced post-traumatic degenerative joint disease left knee as a result of the 1986 job accident, and noted that he had severe permanent damage.

On January 10, 2003 appellant filed a claim for a schedule award.

By letter dated May 1, 2003, appellant was referred to Dr. Martin Barschi, a Board-certified orthopedic surgeon. In a medical report dated May 21, 2003, Dr. Barschi opined that an impairment rating was not appropriate at this time as appellant had not reached maximum medical improvement. He noted that surgery had been requested by his treating physician for removal of hardware to be followed by a total knee replacement.

By decision dated June 9, 2003, the Office denied appellant's claim for a schedule award for the reason that he had not reached maximum medical improvement.

By letter dated June 27, 2003, appellant requested reconsideration. In support thereof, appellant submitted a medical report dated June 18, 2003, wherein Dr. Lubliner opined:

> "**PHYSICAL EXAMINATION**: On evaluation, the patient has a 17 [centimeter] parapatellar scar on his left knee. Range of motion is terrible; 25 degrees to 60 degrees vs. 0 to 140 degrees on the right. He has a valgus attitude of the knee.
>
> "The left quadriceps measures 53 [centimeters] in circumference, the right is 56 [centimeters].
>
> "He has decreased sensation on the lateral border of his scar. There is no instability.
>
> **RADIOGRAPHS**: X-rays were reviewed taken on December 19, 2002. The patient states that they were standing and it shows significant osteoarthritis of the knee. He has three screws in his tibia.
>
> **MEDICAL DECISION MAKING**: At this point, the risks, benefits and alternatives were reviewed. I feel that the patient has a permanent deformity. He has reached maximum medical improvement.
>
> **"**Based on the A.M.A., [American Medical Association] *Guides*, I feel the patient has a 65 percent loss of use of the left lower extremity as a result of his accident of October 10, 1986…."

Appellant also submitted a report dated June 20, 2003, wherein Dr. Wilson stated:

> "[Appellant] has reached maximum medical improvement. I have not requested of him to have a knee replacement nor is it indicated."

By letter dated July 28, 2003, appellant requested a lump-sum payment of the schedule award.

On September 29, 2003 the Office medical adviser reviewed appellant's case, and concluded that appellant was entitled to a schedule award for a 60 percent impairment of the left lower extremity pursuant to the A.M.A., *Guides* (5th ed.), and that his date of maximum medical improvement was June 18, 2003. Citing for support page 537, Table 17-10 of the A.M.A., *Guides*, he noted that appellant was entitled to 10 percent impairment of the left lower extremity for less than 5 degrees extension and 41 percent for flexion of 35 degrees, for a total of 51 percent. Then, utilizing page 544, Table 17-31, he determined that, as appellant had severe degenerative joint disease and narrowing of joint space (with no cartilage interval given), he was entitled to an impairment of 7 percent. He then noted that, pursuant to page 530, Table 17-6, for 3 centimeters of quadriceps he was entitled to a 13 percent impairment. The Office medical adviser, utilizing the Combined Value Charts of the A.M.A., *Guides*, noted that 51 percent impairment combined with 7 percent impairment equals a 54 percent impairment. He then noted that 54 percent impairment combined with a 13 percent impairment equals a 60 percent impairment of the left lower extremity.

The Office, in a decision dated October 10, 2003, issued a schedule award for a 60 percent impairment of the left lower extremity. Appellant's lump-sum award was determined by utilizing 2/3 of appellant's weekly pay rate at the time of his separation from the Peace Corps on November 15, 1986, *i.e.*, $342.77.

LEGAL PRECEDENT -- ISSUE 1

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.404 of the implementing federal regulations,[2] schedule awards are payable for permanent impairment of specified body members, functions or organs. However the Act does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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 A.M.A., *Guides*[3] has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[4]

---

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.404 (2002).

[3] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[4] *See Joseph Lawrence, supra* note 3; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

ANALYSIS -- ISSUE 1

Although appellant's physician, Dr. Lubliner, stated that, pursuant to the A.M.A., *Guides,* appellant had sustained a 65 percent impairment of the left lower extremity, he did not specifically state how he applied the A.M.A., *Guides* to reach this figure. The Office medical adviser purportedly utilized the factual findings from Dr. Lubliner's report and determined that appellant had a 60 percent impairment of the left lower extremity. However, the Office medical adviser did not explain how he derived the numbers he utilized to apply to the A.M.A., *Guides*. For example, the Office medical adviser noted that, pursuant to page 537, Table 17-10, appellant's limitation of less than 5 degrees extension would entitle him to a 10 percent award, and flexion of 35 degrees would entitle him to a 41 percent impairment. Adding 41 percent and 10 percent, he determined that, under this table, appellant was entitled to a 51 percent impairment of his left lower extremity. However, the Board is unable to determine why the Office medical adviser concluded that appellant had less than 5 percent extension and flexion of 35 percent; Dr. Lubliner never noted these figures. The Office medical adviser then discussed appellant's severe degenerative joint disease and narrowing of joint space. Noting that no specific cartilage interval was given by Dr. Lubliner, he indicated that, pursuant to page 544, Table 17-31, appellant would be entitled to a seven percent impairment of the left lower extremity. However, as no cartilage interval was given by Dr. Lubliner, the Office medical adviser could not properly apply Table 17-31, which requires the cartilage interval in determining extent of impairment. The Office medical adviser did properly note that Dr. Lubliner indicated that appellant's left quadriceps measures 53 centimeters in circumference and the right measures 56 centimeters, and properly found that this difference of 3 centimeters would entitle him to a 13 percent impairment pursuant to page 530, Table 17-6. However, due to the fact that the medical record does not clearly support the figures utilized by the Office medical adviser in making his other calculations, this case must be remanded for further explanation by the Office medical adviser, and if necessary, referral of this case for an impartial medical examination.

LEGAL PRECEDENT -- ISSUE 2

Pursuant to section 8142(c)(1) of the Act[5] and the implementing regulation,[6] the pay rate of Peace Corps volunteers is defined as the pay rate in effect on the date following separation, provided that the pay rate equals or exceeds the pay rate on the date of injury. A volunteer who is not a leader and does not have minor children at the time of service is deemed as having a monthly pay rate at a minimum rate for a GS-7. The Board has determined that section 8142 is the exclusive method of computing the compensation pay rate for Peace Corps volunteers.[7]

[5] 5 U.S.C. § 8142(c)(1).

[6] 20 C.F.R. § 10.731.

[7] *Michael Pachovas,* 38 ECAB 191 (1986).

Section 8104(4) of the Act,[8] which provides that the pay rate may be based on pay at date of injury, date of recurrence or date of disability, does not apply to Peace Corps volunteers.[9]

ANALYSIS -- ISSUE 2

The rate of pay for a GS-7 Step 1 on that date was $17,824.00 annually or $342.77 a week, the rate properly used by the Office. As stated *supra*, the Board has found that the monthly pay rate established by section 8142 is the exclusive method of computing the compensation pay rate for Peace Corps volunteers. Section 8142 does not provide for any exceptions to the established monthly pay rate and there is no indication that Congress intended for any exceptions to this pay rate.[10] Accordingly, the Office's use of $342.77 a week as the monthly pay rate upon which to base compensation was proper.

CONCLUSION

As discussed above, the Board remands this case for further consideration of the amount of appellant's schedule award. The Board affirms the Office's finding that appellant's weekly wage for compensation purposes is $342.77.

[8] 5 U.S.C. § 8101(4).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Special Act Cases*, Chapter 2.1700.4(h) (November 1993).

[10] *Michael Pachovas*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 10, 2003 is hereby affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

Issued: June 1, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member