

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

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**JOHN M. EVERARD, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 05-440  
Issued: October 6, 2005**

*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  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 9, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 18, 2004 merit decision concerning his entitlement to schedule award compensation and the Office's August 20, 2004 nonmerit decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over these merit and nonmerit decisions.<sup>1</sup>

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a five percent permanent impairment of his right leg for which he received a schedule award; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On January 12, 1998 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim alleging that he sustained injuries on that date due to a vehicular accident at work. The Office accepted that appellant sustained bilateral knee chondrosis, multiple contusions, torn left medial meniscus, right knee strain, and cervical, lumbar and hip sprains.<sup>2</sup>

Appellant received treatment from Dr. Bruce T. Cohn, an attending Board-certified orthopedic surgeon, and Dr. Jerome B. Yokiell, an attending Board-certified anesthesiologist. In a report dated January 18, 2003, Dr. Yokiell stated that he had been seeing appellant for chronic pain secondary to a back injury.

In March 2003, appellant filed a claim for a schedule award due to his accepted employment injuries. The Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for evaluation of his permanent impairment.<sup>3</sup>

In a report dated March 12, 2003, Dr. Kaffen concluded that appellant had a five percent permanent impairment of his right leg. He reported appellant's pain complaints, including periodic neck pain, bilateral knee pain (worse on the left), and low back pain radiating into the lower extremities without numbness or parathesias. Dr. Kaffen indicated that examination of the cervical spine revealed no tenderness and full range of motion without pain and that examination of the lumbar spine revealed tenderness in the midline and over the paraspinous muscle masses.<sup>4</sup> He indicated that range of motion testing of the lumbar spine showed flexion to 30 degrees, extension of 20 degrees, right lateral bending of 20 degrees and left lateral bending of 20 degrees. Dr. Kaffen stated that the straight leg raising testing yielded normal results, that deep tendon reflexes were equal bilaterally in the upper and lower extremities, and that there was no motor or sensory deficit. He noted that the range of motion testing of the left hip showed flexion of 100 degrees, extension of 0 degrees, abduction of 40 degrees, adduction of 20 degrees, internal rotation of 40 degrees and external rotation of 50 degrees. Dr. Kaffen indicated that examination of the left knee revealed tenderness at the medical joint line without swelling or intra-articular effusion and that range of motion testing of the left knee showed extension of 0 degrees and flexion of 130 degrees.

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<sup>2</sup> Appellant returned to limited-duty work for the employing establishment in February 1998 and regular-duty work in April 1998; the Office paid appropriate compensation for all periods of disability. The Office found that appellant's right knee condition was due to gait adjustments which occurred as a consequence of his left knee condition. Portions of the record indicate that appellant had knee surgery, but reading the record as a whole reveals that appellant did not undergo such surgery. Appellant sustained other employment-related injuries, including lumbar strains in 1999 and 2001; the records from these injuries have been combined with the record for the present case.

<sup>3</sup> In April 2002, Dr. Cohn stated that he had nothing further to offer appellant and noted that he would no longer see him. Dr. Yokiell indicated that he did not perform evaluations of permanent impairment.

<sup>4</sup> Dr. Kaffen indicated that magnetic resonance imaging (MRI) scan testing from 1998 of the left knee was reported as showing a partial tear of the anterior cruciate ligament and a small tear of the medial meniscus, but that MRI scan testing from 2000 showed intra-articular effusion, osteoarthritis and medial meniscus degeneration without a tear.

Dr. Kaffen further stated that examination of the right knee revealed tenderness on compression and palpation of the articular surface of the patella without swelling, intra-articular effusion or ligamentous instability and that range of motion testing of the right knee showed extension of 0 degrees and flexion of 135 degrees. He indicated that appellant had a right thigh atrophy given that his left thigh measured 21.5 inches (54.61 centimeters) in circumference and his right thigh measured 20 inches (50.8 centimeters). Dr. Kaffen stated that appellant did not have sensory or motor loss of the cervical or lumbosacral spine that would constitute a permanent impairment.<sup>5</sup> He determined that appellant did not have any impairment due to limited range of motion of the hips or knees,<sup>6</sup> but found that he was entitled to a five percent impairment rating due to atrophy of the right thigh.<sup>7</sup>

In a report dated April 3, 2003, an Office district medical adviser determined that appellant had a five percent permanent impairment of his right leg based on the atrophy of his right thigh.

By decision dated April 17, 2003, the Office granted a schedule award for a five percent permanent impairment of his right leg.

Appellant requested a hearing before an Office hearing representative which was held on November 20, 2003. He testified that his main problems were in his left knee and argued that he should have received a schedule award for his left leg. Appellant also claimed that his back problems caused impairment of his lower extremities. After the hearing, he submitted several reports of Dr. Yokiell which were dated between April and November 2003.<sup>8</sup>

By decision dated and finalized February 18, 2004, the Office hearing representative affirmed the Office's April 17, 2003 decision.

Appellant submitted a March 10, 2004 letter in which he requested reconsideration of his claim. He argued that Dr. Kaffen did not perform an adequate evaluation of his permanent impairment in that he did not have the results of the proper type of MRI scan testing to review and did not fully consider all the medical conditions of his extremities.<sup>9</sup>

Appellant submitted numerous medical reports, including several reports of Dr. Yokiell, which had previously been considered by the Office. He also submitted several new reports of Dr. Yokiell which were dated February 11, March 14 and June 30, 2004. These reports noted that

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<sup>5</sup> Dr. Kaffen referenced Tables 15-15 and 15-16 on page 424 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

<sup>6</sup> He referenced Tables 17-9 and 17-10 on page 537 of the A.M.A., *Guides*.

<sup>7</sup> He referenced Table 17-6 on page 530 of the A.M.A., *Guides*.

<sup>8</sup> In a report dated November 21, 2003, Dr. Yokiell noted that appellant reported experiencing left knee pain and back pain radiating into his lower extremities.

<sup>9</sup> In July 2004, appellant submitted additional argument of a similar nature.

appellant reported experiencing left knee pain and back pain radiating into his lower extremities.<sup>10</sup>

By decision dated August 20, 2004, the Office denied appellant's request for merit review of his claim.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>12</sup> and its implementing regulation<sup>13</sup> 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 A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that appellant sustained bilateral knee chondrosis, multiple contusions, torn left medial meniscus, right knee strain, and cervical, lumbar and hip sprains due to a January 12, 1998 injury. Based on a March 12, 2003 report of Dr. Kaffen, a Board-certified orthopedic surgeon to whom the Office referred appellant, and an April 3, 2003 review of this evaluation by an Office district medical adviser, the Office granted appellant a schedule award for a five percent permanent impairment of his right leg.

On March 12, 2003 Dr. Kaffen properly determined that appellant would not be entitled to schedule award for his neck or back, for any effects of his neck condition which extended into his lower extremities, or for any effects of his back condition which extended into his lower extremities. A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act; neither the Act nor its implementing regulations provides for a schedule award for impairment to the back or neck.<sup>15</sup> A claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck or back.<sup>16</sup> However, the record does not contain any objective findings on examination or diagnostic testing which would show that appellant sustained permanent

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<sup>10</sup> He submitted several articles from periodicals and other publications.

<sup>11</sup> Appellant submitted additional evidence after the Office's August 20, 2004 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

<sup>12</sup> 5 U.S.C. § 8107.

<sup>13</sup> 20 C.F.R. § 10.404 (1999).

<sup>14</sup> *Id.*

<sup>15</sup> *See James E. Mills*, 43 ECAB 215, 219 (1991); 5 U.S.C. § 8107(c).

<sup>16</sup> *Thomas J. Engelhart*, 50 ECAB 319, 320-21 (1999).

impairment of the extremities because effects of his neck condition extended into his lower extremities or effects of his back condition extended into his lower extremities.<sup>17</sup>

Dr. Kaffen correctly found that appellant was not entitled to any impairment rating due to the range of motion testing of the left knee showing extension of 0 degrees and flexion of 130 degrees and the range of motion testing of the right knee showing extension of 0 degrees and flexion of 135.<sup>18</sup> He based his finding that appellant had a five percent permanent impairment of his right leg on the atrophy of his right thigh as observed on examination. Appellant's left thigh measured 21.5 inches or 54.61 centimeters in circumference and his right thigh measured 20 inches or 50.8 centimeters and therefore he had a right thigh atrophy of 1.5 inches or 3.81 centimeters. Table 17-6 on page 530 of the A.M.A., *Guides* suggests that such a finding would constitute a "severe" impairment which represents a 13 percent permanent impairment.<sup>19</sup> Therefore, it appears that appellant may be entitled to schedule award for more than a five percent permanent impairment of his right leg.<sup>20</sup> For these reasons, the case should be remanded to the Office for further evaluation of the extent of appellant's entitlement to schedule award compensation.

### **CONCLUSION**

The Board finds that the case is not in posture for decision regarding whether appellant has more than a five percent permanent impairment of his right leg for which he received a schedule award. The case is remanded to the Office for further proceedings which it deems necessary, to be followed by an appropriate decision on this matter. Given the Board's determination regarding the merit issue of the present case, it is not necessary for the Board to consider whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>17</sup> The first report which notes that appellant reported experiencing back pain radiating into his lower extremities is the November 21, 2003 report of Dr. Yokiel, an attending Board-certified anesthesiologist. The record does not contain any report which contains objective findings showing that appellant had a medical condition in his neck or back which extended into his extremities.

<sup>18</sup> See A.M.A., *Guides* 537, Table 17-10.

<sup>19</sup> See *id.* at 530, Table 17-6.

<sup>20</sup> Dr. Kaffen also properly found that appellant was not entitled to an impairment rating for loss of left hip motion. See A.M.A., *Guides* 537, Table 17-10. However, it is not clear that he evaluated any loss of right hip motion appellant might have as he did not provide measurements for this motion. The April 3, 2003 report of the Office district medical adviser contains similar deficiencies.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' August 20, 2004 decision is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: October 6, 2005  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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