United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 10-653**
	)	**Issued: January 5, 2011**
DEPARTMENT OF THE INTERIOR, NATIONAL CAPITOL PARK CENTRAL, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
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 January 20, 2010 appellant filed a timely appeal of the September 11, 2009 schedule award decision of the Office of Workers' Compensation Programs and the January 6, 2010 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has more than three percent impairment of his right lower extremity; and (2) whether the Office properly denied his request for a hearing.

FACTUAL HISTORY

This case was previously before the Board.[1] By decision dated July 7, 2009, the Board reversed the June 3, 2008 Office decision that terminated appellant's wage-loss compensation for refusing an offer of suitable work. The facts and the law of the case as sat forth in the Board's prior decision are incorporated herein by reference.

On June 3, 2006 appellant filed a claim for a schedule award. The Office denied his claim by decision dated September 28, 2006.

In a February 9, 2007 report, Dr. Uchenna R. Nwaneri, an attending orthopedic surgeon, reviewed the medical history and provided findings on physical examination. He found that appellant had 44 percent right leg impairment due to decreased flexion, thigh muscle atrophy, muscle weakness, a partial medial meniscectomy and mild ankle laxity, based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On March 14, 2007 Dr. Montague Blundon, III, a Board-certified orthopedic surgeon and an Office referral physician, reviewed the medical history and provided findings on physical examination. In a supplemental report dated May 29, 2007, Dr. Blundon advised that appellant had 20 percent right lower extremity impairment.

In order to resolve the conflict in medical opinion between Dr. Nwaneri and Dr. Blundon, the Office referred appellant, together with the case file, statement of accepted facts and a list of questions, to Dr. Hamid R. Quraishi, a Board-certified orthopedic surgeon.

On August 22, 2007 Dr. Quraishi reviewed the medical history and provided findings on physical examination. He opined that appellant had 14 percent right lower extremity impairment, including 6 percent for calf atrophy, 3 percent for thigh atrophy, 2 percent for a partial medial meniscectomy and 3 percent for chondroplasty of the patella, based on the fifth edition of the A.M.A., *Guides*.

On October 31, 2007 Dr. Lawrence A. Manning, an orthopedic surgeon and an Office medical adviser, noted discrepancies in the calf and thigh circumference measurements provided in Dr. Quraishi's report. He noted that Dr. Quraishi found three percent impairment for

[1] *See* Docket No. 08-2368 (issued July 7, 2009). On January 10, 2005 appellant, then a 50-year-old maintenance worker at the Jefferson Memorial, sustained a right knee sprain and a right medial meniscus tear at work when he carried trash down some stairs, missed a step and hyperextended his knee. On April 20, 2006 he underwent right knee surgery, including arthroscopic chondroplasty of patellofemoral articulation and a partial medial meniscectomy.

chondroplasty of the patella in addition to two percent for a partial meniscectomy, which was a diagnosis based impairment. Dr. Manning advised that there was no provision in the A.M.A., *Guides* for impairment due to chondroplasty of the patella.[2] He advised that a diagnosis-based impairment could not be combined with muscle atrophy, according to Table 17-2 at page 526 of the fifth edition of the A.M.A., *Guides*. Dr. Manning opined that appellant was entitled to the impairment with the greater percentage, three percent for muscle atrophy as compared to two percent for a partial meniscectomy.

On November 26, 2007 the Office granted appellant a schedule award based on three percent right lower extremity impairment, for 8.64 weeks, from November 8, 2007 to January 7, 2008.[3] The record indicates that appellant received full payment of this schedule award.

On February 25, 2008 an Office hearing representative set aside the November 26, 2007 decision and remanded the case for further development of the medical evidence. He noted discrepancies in calf and thigh circumferences measurements in Dr. Quraishi's report and advised that a diagnosis-based impairment rating could not be combined with deficits on physical examination.

In a report dated April 3, 2008, Dr. Quraishi advised that appellant's right calf was 42.5 centimeters (cm) in circumference, the left calf 44.0 cm, a difference of 1.5 cm. Appellant's right thigh circumference was 55 cm, the left thigh 56 cm, a difference of 1 cm.

On April 16, 2008 the Office asked Dr. Quraishi to address the percentage of right leg impairment due to calf and thigh atrophy. On April 17, 2008 Dr. Quraishi stated that appellant had six percent impairment due to 1.5 cm of right calf atrophy and three percent for 1 cm of right thigh atrophy according to Table 17-6 at page 530 of the fifth edition of the A.M.A., *Guides*. The total impairment was nine percent.

On July 30, 2009 Dr. Manning stated that appellant had two percent right lower extremity impairment for a partial meniscectomy, according to Table 16-3 at page 509 (Knee Regional Grid) of the sixth edition of the A.M.A, *Guides*.[4] He stated that the impairment was Class 1 with a default value of 2. Dr. Manning noted that the findings in the medical records suggested that the adjustment grids would keep the value at the default range of two percent.

[2] *See* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (January 2010) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[3] The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of the lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by three percent equals 8.64 weeks of compensation.

[4] *See infra* note 7.

By decision dated September 11, 2009, the Office found that appellant had no more than three percent right lower extremity impairment for which he had already received a schedule award.

On December 14, 2009 appellant requested an oral hearing.

By decision dated January 6, 2010, the Branch of Hearings and Review denied appellant's request for a hearing on the grounds that it was filed more than 30 days after the September 11, 2009 decision. It exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new evidence.[5]

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] 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 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* sixth edition has been adopted by the Office as the appropriate standard for evaluating schedule losses.[8]

Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[9] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

[5] Subsequent to the January 6, 2010 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404; FECA Bulletin No. 9-03 (issued March 15, 2009) (providing for use of the sixth edition of the A.M.A., *Guides* effective May 1, 2009).

[8] *Id.*

[9] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[10] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

ANALYSIS -- ISSUE 1

The Board finds that appellant has no more than three percent right lower extremity impairment.

The Office found a conflict in medical opinion between Dr. Nwarei and Dr. Blundon as to appellant's right lower extremity impairment. It referred appellant to Dr. Quraishi who found that he had nine percent impairment for thigh and calf atrophy based on the fifth edition of the A.M.A., *Guides*. In his April 16, 2008 report, Dr. Quraishi clarified that appellant had impairment due to 1.5 cm of right calf atrophy and 1 cm of right thigh atrophy.

On July 30, 2009 Dr. Manning reviewed Dr. Quraishi's reports and stated that appellant had two percent right lower extremity impairment for a partial menisectomy. He explained that according to Table 16-3 at page 509 (Knee Regional Grid) of the sixth edition of the A.M.A, *Guides*[11] a partial medial menisectomy is rated in the range of one to three percent permanent impairment. The default value is two percent and is adjusted down to one percent or up to three percent based on the class of the diagnosis and the grade modifiers such as functional history, physical examination and clinical studies.[12] Dr. Manning rated appellant's impairment as Class 1 with a default value of two percent. He noted that the findings in the medical records suggested that the adjustment grids would keep the value at the default range of two percent. The Board finds however that appellant's permanent impairment of the right lower extremity is three percent.

The net adjustment formula requires that the default impairment of two percent medial menisectomy be reduced by the class of the diagnosis to a one percent impairment rating.[13] However, appellant's atrophy of the thigh and of the calf, rated by the impartial medical advisor, both qualify as physical examination adjustments pursuant to Table 16-7. As both are Grade 1 modifiers, his total impairment of the right lower extremity is three percent. There is no medical evidence establishing that appellant has more than three percent right lower extremity impairment based on the sixth edition of the A.M.A., *Guides*.

On appeal, appellant contends that he has 20 percent right lower extremity impairment because, on June 11, 2007, the Office advised that Dr. Blundon's report represented the weight of the medical evidence. The record reflects that the Office's June 11, 2007 letter advised him and the employing establishment that Dr. Blundon's March 14, 2007 report represented the weight of the medical evidence on the issue of work capacity, not the issue of right lower extremity impairment. On the issue of impairment, the Office found a conflict between Dr. Nwaneri and Dr. Blundon and referred appellant to Dr. Quraishi for resolution of the conflict. The Office did not find that Dr. Blundon's report represented the weight of the medical evidence regarding the issue of his right lower extremity impairment.

[11] As noted, the sixth edition of the A.M.A., *Guides* became effective on May 1, 2009.

[12] A.M.A., *Guides* (6th ed.) 497.

[13] *See* menisectomy example at page 522.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office hearing representative, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[14] A hearing is a review of an adverse decision by an Office hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[15] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.[16] A claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision.[17] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[18] In such a case, the Office will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[19]

ANALYSIS -- ISSUE 2

On December 14, 2009 appellant requested an oral hearing regarding the September 11, 2009 merit decision. As noted, a claimant is not entitled to a hearing or a review of the written record if the request is not made within 30 days of the date of the decision. Appellant's hearing request was denied by the Office as it was untimely. The Office exercised its discretion and determined that the issue in the case could be addressed equally well through a reconsideration request and the submission of new medical evidence. The Board finds no evidence that the Office abused its discretion in denying appellant's untimely request for a hearing.

CONCLUSION

The Board finds that appellant has more than three percent impairment to his right lower extremity for which he received a schedule award. The Board further finds that the Office did not abuse its discretion in denying his request for a hearing.

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 10.615.

[16] *Id*. at § 10.616(a).

[17] *James Smith*, 53 ECAB 188 (2001).

[18] 20 C.F.R. § 10.616(b).

[19] *Supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2010 and September 11, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 5, 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