

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

T.N., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Burlington, NJ, Employer**

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**Docket No. 10-2081
Issued: May 19, 2011**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On August 2, 2010 appellant filed a timely appeal from a May 5, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 25 percent right leg permanent impairment.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 18, 2005 appellant, then a 47-year-old custodian, filed a recurrence of disability (Form CA-2a) reporting an original injury on October 13, 1998.² He claimed that he injured his right knee, noting waxing of the floor on January 15, 2005 and shoveling snow on January 24, 2005.

The Office developed the claim as a new injury. On November 30, 2005 it accepted the claim for traumatic arthropathy of the right leg. On May 24, 2007 appellant underwent right knee surgery performed by Dr. Robert Taffet, an orthopedic surgeon, who performed a right total knee arthroplasty, tibial osteotomy with intramedullary rodding of tibia and total knee replacement above the tibial rod. He returned to a light-duty position on April 7, 2008.³

On September 18, 2008 appellant filed a claim for a schedule award. In a June 5, 2008 report, Dr. David Weiss, an osteopath, reviewed a history of injury and results on examination. As to range of motion, he stated “flexion-extension of 0-120/140 degrees.” With respect to a permanent impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (hereinafter), Dr. Weiss opined that appellant had a 50 percent leg impairment, based on a fair result for a total knee replacement.

In a report dated June 9, 2009, Dr. Taffet stated that appellant was doing well with his right knee replacement, his left knee was still bothering him but appellant was not ready to consider left knee surgery. By letter dated July 29, 2009, the Office requested that appellant submit medical evidence regarding his right knee permanent impairment under the sixth edition of the A.M.A., *Guides*.

In a September 2, 2009 report, Dr. Craig Uejo, an occupational medicine specialist, stated that he reviewed the report of Dr. Weiss. He identified Table 16-3 of the sixth edition of the A.M.A., *Guides* for rating impairment. Dr. Uejo noted the default impairment of 25 percent for a Class 2 diagnostic criteria, with grade modifiers of 1 for functional history, 3 for physical examination, with no modifier applied for clinical studies. He concluded that there was no adjustment from the default value and appellant had a 25 percent right leg impairment. Dr. Weiss stated in a brief September 4, 2009 report that he agreed with Dr. Uejo. In a report dated December 23, 2009, an Office medical adviser reviewed the medical evidence and agreed that appellant had a 25 percent right leg impairment.

By decision dated February 2, 2010, the Office issued a schedule award for a 25 percent right leg impairment. The period of the award was 72.00 weeks of compensation, commencing January 17, 2010.

² The record indicates that appellant had a prior claim for a right knee injury on October 13, 1998, accepted for a torn medial meniscus. Appellant had been a letter carrier and had accepted a position as custodian.

³ Appellant began receiving \$27.33 in compensation every 28 days, based on an offset for loss of night differential.

In a letter dated February 17, 2010, appellant requested a review of the written record. He argued that there was a delay in issuing the schedule award decision and the rating should have been made under the fifth edition of the A.M.A., *Guides* instead of the sixth edition.

By decision dated May 5, 2010, an Office hearing representative affirmed the February 2, 2010 decision. The hearing representative found that the schedule award decision was properly based on the medical evidence applying the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

Section 8107 of the Act 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.⁴ 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 A.M.A., *Guides* as the uniform standard applicable to all claimants.⁵

Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*.⁶ Any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after May 1, 2009, should be based on the sixth edition of the A.M.A., *Guides*. A claimant who has received a schedule award calculated under a previous edition and who claims an increased award, will receive a calculation according to the sixth edition for any decision issued on or after May 1, 2009.⁷

ANALYSIS

In a September 2, 2009 report, Dr. Uejo found that appellant had a 25 percent right leg permanent impairment. Under Table 16-3, the knee regional grid, a Class 2 (moderate problem) diagnostic criteria (CDX) has a default leg impairment of 25 percent for a good result from a total knee replacement.⁸ The impairment is then adjusted according to grade modifiers for functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS). Dr. Uejo found a grade modifier of 1 for functional history⁹ and 3 for physical examination.¹⁰

⁴ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

⁵ *A. George Lampo*, 45 ECAB 441 (1994).

⁶ FECA Bulletin No. 09-03 (March 15, 2009); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (January 2010).

⁷ *Id.*

⁸ A.M.A., *Guides* 511, Table 16-3. The range of impairments for a good result are 21 to 25 percent.

⁹ *Id.* at 516, Table 16-6, provides a grade modifier of 1 for an antalgic limp corrected with orthotics or footwear modifications.

¹⁰ *Id.* at 517, Table 16-7 identifies a grade modifier of 3 for a severe problem.

He did not use clinical studies as this was used for placement in the regional grid.¹¹ Applying the formula GMFH-CDX + GMPE-CDX results in a 0 net adjustment.¹²

The Board finds that Dr. Uejo represents the weight of the evidence. Dr. Weiss and an Office medical adviser subsequently concurred that the impairment was 25 percent. Dr. Uejo properly applied the A.M.A., *Guides* and the Board finds no probative evidence to establish more than 25 percent right leg permanent impairment.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's impairment was 25 percent, he is entitled to 25 percent of 288 weeks or 72 weeks of compensation.¹³

On appeal, appellant asserts that he has property right in a schedule award benefit under the fifth edition and a protected property interest cannot be deprived without due process, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). These cases held only that a claimant who was in receipt of benefits (in *Goldberg* public assistance and in *Mathews* Social Security benefits) could not have those benefits terminated without procedural due process.¹⁴ In this case, appellant is simply making a claim for a schedule award. He was not in receipt of schedule award benefits nor was the Office attempting to terminate benefits. Appellant has no vested right to a schedule award under the fifth edition of the A.M.A., *Guides*.

Appellant argued that there was a delay in the adjudication of the claim for a schedule award, which deprived him of due process rights regarding a determination under the fifth edition of the A.M.A., *Guides*. The Board notes that the Office contacted the representative's office in February 2009 with respect to a possible consequential left knee injury. According to the memorandum, the Office advised that it would not proceed on the schedule award claim for the right knee since it appeared that appellant was also pursuing a left knee claim and could file an appropriate claim in the future. The Board does not find that there was any delay in the adjudication of the schedule award claim. In *Harry Butler*,¹⁵ the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.¹⁶ On

¹¹ *Id.* at 516.

¹² *Id.* at 521.

¹³ The Board notes that the maximum for monaural hearing loss is 52 weeks. With an 18.75 monaural loss in the right ear and 11.25 in the left, the total number of weeks of compensation for monaural loss would be 15.60. Since the binaural loss results in a greater number of weeks, the Office properly based the award on binaural hearing loss.

¹⁴ In *Mathews* the court noted that the private interest that would be adversely affected by the erroneous termination of benefits was likely to be less in a disabled worker than a welfare recipient and due process would not require an evidentiary hearing.

¹⁵ 43 ECAB 859 (1992).

¹⁶ *Id.* at 866.

March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of the Office should reflect use of the sixth edition of the A.M.A., *Guides*.¹⁷ The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of maximum medical improvement or when the claim for such award was filed. The Office properly determined appellant's right leg permanent impairment under that edition.

CONCLUSION

The Board finds that appellant has not established more than a 25 percent permanent impairment to his right leg.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 5 and February 2, 2010 are affirmed.

Issued: May 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁷ FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part -- Claims, *Schedule Award & Permanent Disability Claims*, Chapter 2.808.6(a) (January 2010).