

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MELVIN HARPER and DEPARTMENT OF THE NAVY,
CHARLESTON NAVAL SHIPYARD, Charleston, SC

*Docket No. 98-44; Submitted on the Record;
Issued July 27, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on July 15, 1996 causally related to his June 27, 1995 employment injury; and (2) whether appellant has more than a 10 percent permanent impairment of his right lower extremity for which he received a schedule award.

The Board has duly reviewed the case on appeal and finds that the issue of recurrence of disability is not in posture for decision.

Appellant filed a claim alleging that on June 27, 1995, he injured his knee in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for tear of the medial meniscus, right knee on August 25, 1995. He returned to limited-duty work on September 25, 1995. Appellant filed a claim requesting a schedule award on October 19, 1995. He filed a notice of recurrence of disability alleging on July 15, 1996 he sustained a recurrence of disability as his light-duty position was terminated. By decision dated October 2, 1996, the Office performed a retroactive wage-earning capacity determination. Appellant requested an oral hearing. By decision dated June 25, 1997, the Branch of Hearings and Review found that the case was not in posture for decision and set aside the October 2, 1996 decision. The hearing representative directed the Office to undertake additional development of the factual evidence in determining whether a limited-duty position was available for appellant. By decision dated August 27, 1997, the Office denied appellant's claim for recurrence of disability. In a decision dated August 29, 1997, the Office granted appellant a schedule award for 10 percent permanent impairment of his right lower extremity.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a

change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹

In this case, appellant returned to light-duty work on September 25, 1995. Appellant filed a notice of recurrence of disability on August 26, 1996 alleging that the employing establishment could not provide light duty within his restrictions. He stated that he was terminated from the employing establishment on March 15, 1996 and that he used sick leave until July 15, 1996. Appellant's supervisor stated on December 8, 1995 the employing establishment provided appellant with a "notice of proposed separation-disability" due to his work restrictions. Appellant asked to file for disability retirement and continued to work. The employing establishment closed on April 1, 1996 and appellant used sick leave until July 15, 1996 when the Office of Personnel Management approved his disability retirement.

The hearing representative remanded appellant's claim for recurrence to the Office on June 25, 1997 and directed the Office to obtain copies of the appropriate documents pertaining to the proposal to separate appellant because of inability to perform his date-of-injury position and any documents pertaining to a termination.

The Office requested additional information from appellant on letter dated July 10, 1997 and requested additional information from the employing establishment by letter dated July 15, 1997. The Office denied appellant's claim for recurrence by decision dated August 27, 1997. The Office specifically denied appellant's claim finding that he failed to submit sufficient medical evidence to establish a causal relationship between his current condition and his accepted employment injury. As appellant alleged that his recurrence of disability was the result of a change in his light-duty availability rather than in his medical condition, the Office denied his claim on improper grounds.

The Board further notes that the hearing representative specifically instructed the Office to obtain documents relevant to appellant's claim from the employing establishment. The Board has held that the Office has a responsibility in developing the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.² In this case, the Office failed to properly develop the factual evidence in determining whether the employing establishment was able to provide appellant light duty within his restrictions. On remand, the Office should further develop the factual evidence to determine whether there was a change in the availability of light duty for appellant such that he sustained a recurrence of disability.

The Board further finds that appellant has no more than 10 percent permanent impairment of his right lower extremity.

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Willie A. Dean*, 40 ECAB 1208, 1212 (1989).

Under section 8107 of the Federal Employees' Compensation Act³ and section 10.304 of the implementing federal regulations,⁴ schedule awards are payable for permanent impairment of specified body members, functions or organs. However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants the Office adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment*⁵ as a standard for determining the percentage of impairment, and the Board has concurred in such adoption.⁶

Appellant's attending physician, Dr. Roberta A. Kasman, a Board-certified orthopedic surgeon, completed a form report on October 18, 1995 and found that appellant had 20 percent permanent impairment of his right lower extremity based on full thickness loss of articular cartilage in the patella. Dr. Kasman stated that this loss was documented by appellant's August 30, 1995 arthroscopy. She stated that appellant reached maximum medical improvement on October 18, 1995. On January 22, 1996 Dr. Kasman stated that she based appellant's impairment rating on complete loss of articular cartilage in the patellofemoral joint. She stated that this finding was based on arthroscopic examination rather than x-ray findings.

In a report dated August 1, 1996, Dr. Humberto A. Revollo, a radiologist, stated that x-rays demonstrated that the right knee compartment measures at the medial portion of the knee three millimeters and in the lateral side five millimeters. Dr. Revollo found that the femoral patellar space measured three millimeters. He concluded that appellant had 20 percent impairment of the knee in accordance with the A.M.A., *Guides*.

In a report dated December 19, 1996, Dr. Howard L. Brilliant, a Board-certified orthopedic surgeon, found that appellant reached maximum medical improvement on September 26, 1996 and noted that appellant retained active flexion of 120 degrees and retained extension of 5 degrees. He found additional impairment of function due to weakness, atrophy, pain or discomfort at 10 percent of the lower extremity and recommended an impairment rating of 10 percent of the right lower extremity.

The Office medical adviser reviewed the medical evidence of record and concluded that appellant had seven percent permanent impairment of the right lower extremity based on the A.M.A., *Guides*. The A.M.A., *Guides* provide that x-ray findings are a more objective and valid method for assigning impairment estimates than physical findings such as range of motion or joint crepitation. Specifically, the A.M.A., *Guides* find that x-ray evidence of change in cartilage interval or joint space provide the best method of determining impairment.⁷ As noted by the Office medical adviser a three millimeter cartilage interval in the knee is seven percent

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.304.

⁵ A.M.A., *Guides* (4th ed. 1993).

⁶ *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

⁷ A.M.A., *Guides*, 82.

impairment of the lower extremity.⁸ As this report is the only medical evidence of record which properly correlates appellant's x-ray findings with the A.M.A., *Guides*, the Office medical adviser's report is entitled to the weight of the medical evidence and establishes that appellant has no more than 10 percent permanent impairment of his right lower extremity.

The August 29, 1997 decision of the Office of Workers' Compensation Programs is hereby affirmed. The August 27, 1997 decision denying appellant's claim for recurrence of disability is hereby set aside and remanded for further development consistent with this opinion.

Dated, Washington, D.C.
July 27, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁸ A.M.A., *Guides*, 83, Table 62.