U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GUSTAVO L. ROJO and DEPARTMENT OF JUSTICE, BORDER PATROL, Mercedes, TX

Docket No. 00-932; Submitted on the Record;
Issued February 7, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether appellant has more than a nine percent permanent impairment of his left lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on November 15, 1999.

The Board has duly reviewed the case on appeal and finds that appellant has no more than a nine percent permanent impairment of his left lower extremity for which he received a schedule award.

Appellant, a border patrol agent, filed a notice of traumatic injury alleging that on October 2, 1995 he hyperextended his left knee in the performance of duty. The Office accepted appellant's claim for internal derangement of the left knee and authorized arthroscopy. The Office granted appellant a schedule award for a nine percent permanent impairment to his left lower extremity on April 20, 1998. Appellant disagreed with this assessment and requested an oral hearing on May 7, 1998. By decision dated July 24, 1999, the hearing representative affirmed the Office's April 20, 1998 decision. Appellant requested reconsideration on November 1, 1999 and by decision dated November 15, 1999, the Office declined to reopen appellant's claim for review of the merits.

Under section 8107 of the Federal Employees' Compensation Act[1] and section 10.304 of the implementing federal regulations,[2] 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

[1] 5 U.S.C. § 8107.

[2] 20 C.F.R. § 10.304.

Association, *Guides to the Evaluation of Permanent Impairment*[3] as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[4]

In this case, appellant's attending physician, Dr. S. Gopal Krishnan, a Board-certified orthopedic surgeon, completed a report on July 14, 1997 and stated that appellant had reached maximum medical improvement. On September 25, 1997 he stated that appellant had no swelling in his left knee and that medial lateral stability was excellent. Dr. Krishnan provided appellant's impairment rating in accordance with the A.M.A., *Guides* on October 21, 1997. He stated that appellant had 10 percent impairment due to his partial meniscectomy and 25 percent impairment due to the severe cruciate ligament injury. Dr. Krishnan concluded that appellant had 35 percent impairment of his lower extremity.

The Office medical adviser reviewed Dr. Krishnan's reports on December 8, 1997 and found that there were internal inconsistencies. Specifically he noted that Dr. Krishnan found both excellent knee stability and severe cruciate ligament laxity.

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from appellant's physician. In obtaining medical evidence required for a schedule award, the evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its resulting restrictions and limitations.[5]

As Dr. Krishnan's reports lacked sufficient findings to support his conclusion of severe cruciate ligament laxity, the Office properly referred appellant for a second opinion evaluation to determine the extent of his permanent impairment to his left lower extremity.

The Office referred appellant for a second opinion evaluation with Dr. R. Chandrasekharan, a Board-certified orthopedic surgeon. In his January 26, 1998 report, Dr. Chandrasekharan noted appellant's history of injury and provided his findings on physical evaluation. He stated that appellant complained of pain and crepitation in his left knee. Dr. Chandrasekharan found that appellant's left knee had complete extension and 125 degrees of flexion. He found that appellant's knee joint was stable with a questionable Lachman's sign and negative pivot shift. Dr. Chandrasekharan determined that appellant had mild cruciate ligament laxity for seven percent impairment of the left lower extremity.[6] He further found that appellant had partial meniscectomy of the medial meniscus which was two percent impairment of the left lower extremity.[7] Dr. Chandrasekharan concluded that appellant's loss of flexion was not a

[3] A.M.A., *Guides* (4th ed. 1993).

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

[5] *Robert B. Rozelle*, 44 ECAB 616, 618 (1993).

[6] A.M.A., *Guides*, 85, Table 64.

[7] *Id.*

compensable impairment under the A.M.A., *Guides*.[8] The Office medical adviser reviewed this report and concluded that appellant had a nine percent permanent impairment of his left lower extremity.

Dr. Krishnan completed a report on March 4, 1998 and stated that he disagreed with Dr. Chandrasekharan's findings. Dr. Krishnan stated that appellant had 14 percent impairment due to 10 percent impairment to the cruciate ligament and 4 percent impairment to the meniscus.

The Board notes that Dr. Krishnan's November 20, 1995 operative report states that the lateral meniscus looked quite clean and that he "punched out and saucerized" the medical meniscus only. The A.M.A., *Guides* provide for four percent impairment of the whole person for partial meniscectomy of both the lateral and medial menisci.[9] As there is no evidence in the record to support injury and repair to both menisci, appellant is not entitled to an impairment rating for both. Furthermore, the Act does not provide for schedule awards for impairment to the whole person, only for impairments to the specified schedule members.[10]

Dr. Krishnan found appellant had severe cruciate ligament laxity entitling him to 10 percent impairment of the whole person.[11] The Board notes that Dr. Krishnan did not provide any physical findings in support of his conclusion that appellant had severe cruciate ligament laxity. Furthermore, as noted above, the Act does not provide for impairments to the whole person.

Dr. Krishnan repeated these findings in his March 31, 1999 report. He stated that appellant had a cruciate ligament tear requiring replacement and that this was 10 percent impairment of the whole person. Dr. Krishnan altered his impairment rating by finding that appellant had one percent impairment of the whole person due to partial meniscectomy of the medial meniscus. These findings are insufficient to establish that appellant has more than a nine percent permanent impairment of the left lower extremity for the reasons listed above.

Dr. Krishnan then concluded that appellant had a three percent impairment to the whole person due to chondromalacia in accordance with Table 62 of the A.M.A., *Guides*.[12] The Board has held that this Table of the A.M.A., *Guides* may be used only if roentgenographs were utilized in determining the degree of impairment. Dr. Krishnan has submitted no evidence that he examined x-rays to determine the extent of cartilage loss due to appellant's accepted employment injury. Therefore, this opinion on appellant's impairment due to chondromalacia is not sufficient to establish that appellant has more than a nine percent permanent impairment of his left lower extremity.

[8] A.M.A., *Guides*, 78, Table 41.

[9] A.M.A., *Guides*, 85, Table 64.

[10] 5 U.S.C. § 8107.

[11] A.M.A., *Guides*, 85, Table 64.

[12] A.M.A., *Guides*, 83, Table 62.

As there is no rationalized medical opinion evidence explaining why appellant has severe anterior cruciate ligament laxity rather than the mild laxity found by Dr. Chandrasekharan and the excellent medial lateral stability found by Dr. Krishnan on September 25, 1997, appellant is not entitled to more than a seven percent permanent impairment for this condition. Furthermore, there are no x-rays findings in the record supporting a loss of cartilage intervals entitling appellant to additional impairment rating for this condition. Therefore, the Board finds that there is no evidence that appellant has more than a nine percent permanent impairment of his left lower extremity.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on November 15, 1999.

Appellant requested reconsideration of the hearing representative's decision on November 1, 1999. He alleged that Dr. Chandrasekharan did not perform an appropriate physical examination and that neither he nor his staff were well respected. Appellant also submitted an additional report from Dr. Krishnan dated August 2, 1999. By decision dated November 15, 1999, the Office declined to reopen appellant's claim for consideration of the merits.

The Office's regulations provide that a timely request for reconsideration in writing may be reviewed on its merits if the employee has submitted evidence or argument which shows that the Office erroneously applied or interpreted a specific point of law; advances a relevant legal argument not previously considered by the Office or constitutes relevant and pertinent new evidence not previously considered by the Office.[13]

The Board finds that appellant's argument that Dr. Chandrasekharan did not provide an adequate physical examination is not supported by the record and that appellant advanced this argument before the hearing representative. Therefore this argument has previously been considered by the Office.

Appellant alleged that the Office should have granted his request for a schedule award without referring him to a second opinion physician. The Office clearly considered whether it was necessary to refer appellant for a second opinion evaluation prior to making the referral and based its decision to make the referral on the recommendation of the Office medical adviser. This argument has been considered by the Office and is not sufficient to require the Office to review appellant's claim on the merits.

In his August 2, 1999 report, Dr. Krishnan stated that stability of the knee was improved because of cruciate ligament augmentation, but that appellant had initially sustained a complete tear of his ligament. He further stated that on arthroscopy appellant had post-traumatic chondromalacia involving the medial femoral condyle along with compartmental synovitis. Both of these findings were included in Dr. Krishnan's operative report on November 20, 1995. Dr. Krishnan noted that in his March 31, 1999 report he found that appellant had 14 percent impairment due to chondromalacia, meniscal pathology and cruciate ligament tear. The hearing

[13] 5 U.S.C. §§ 10.609(a) and 10.606(b).

representative reviewed the March 31, 1999 report prior to issuing the July 24, 1999 decision. Therefore, Dr. Krishnan's report does not contain relevant new evidence not previously considered by the Office.

As appellant has failed to submit new legal arguments or new and relevant evidence, the Office properly declined to reopen his claim for consideration of the merits.

The November 15 and July 24, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 7, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member