U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOE L. CABRERA and U.S. POSTAL SERVICE,
POST OFFICE, Fresno, CA

Docket No. 00-1917; Submitted on the Record;
Issued May 7, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant has more than a two percent permanent impairment of the right lower extremity for which he received a schedule award; and (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a review of the written record.

On October 22, 1991 appellant, then a 43-year-old postman, injured his right knee when he bent over to pick up his keys from the ground. The Office accepted the claim for a right medial meniscus tear and later expanded this to include a left medial meniscus tear and authorized arthroscopic surgery.

Appellant submitted various treatment records from Dr. Robert M. Mochizuki, a Board-certified orthopedic surgeon, dated December 1991 through January 1992; a magnetic resonance imaging (MRI) scan dated December 21, 1991; and a second opinion report from Dr. Charles H. Touton, a Board-certified orthopedic surgeon, dated March 30, 1992. Dr. Mochizuki's treatment notes document the history of appellant's right knee injury and recommended appellant undergo, arthroscopic surgery to repair the torn medical meniscus. The MRI scan of the right knee dated December 20, 1991 revealed an extensive tear of the posterior horn and body of the medial meniscus and noted a popliteal cyst. The second opinion report from Dr. Touton documented the history of appellant's right knee injury and indicated that appellant sustained a torn medial meniscus of the right knee with a popliteal cyst of the right knee. He recommended arthroscopic surgery to repair the torn medial meniscus.

In an April 22, 1992 operative report, Dr. Mochizuki noted, performing an arthroscopy of the right knee with arthroscopic resection of the torn portion of the medial meniscus, arthroscopic shavial of the femoral condyle, and arthroscopic synovectomy of the right knee.

In progress notes dated April 29 and October 7, 1992, Dr. Mochizuka indicated appellant was healing properly and was fully ambulatory. He indicated in notes dated August 26, 1992 that appellant's right knee flexion was 120 degrees with full extension. Dr. Mochizuki's note

dated October 7, 1992 indicated that this was appellant's final visit for his right knee. He noted appellant was working achieving his usual customary capacity of walking his seven to eight mile mail route. Dr. Mochizuka noted upon examination that appellant was able to achieve full extension. He noted that appellant reached maximum medical improvement from surgical intervention. Dr. Mochizuka indicated appellant should suffer no residuals from his right knee.

On June 10, 1998 appellant filed a claim for a schedule award for his right knee.[1]

On August 7, 1998 the Office referred appellant to Dr. Mochizuki, for an evaluation of the extent of any permanent impairment arising from his accepted employment injuries to both knees in accordance with the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment,* (4th ed. 1993). In August 27 and September 1, 1998 reports, Dr. Mochizuki rated appellant's permanent impairment of the left leg but he did not offer a specific opinion regarding appellant's right leg.

On August 25, 1999 the Office referred appellant's case record to the Office's medical adviser for an evaluation of the extent of any permanent impairment arising from appellant's accepted employment injuries of his right lower extremity in accordance with the A.M.A., *Guides.* By report dated August 30, 1999, the Office medical adviser determined, using the A.M.A., *Guides,* that appellant sustained a two percent impairment of the right lower extremity with the maximum medical improvement date of October 7, 1992.

In a decision dated October 22, 1999, the Office granted appellant a schedule award for a two percent impairment for lower right extremity.

In a letter dated December 18, 1999, appellant requested a review of the written record of the Office decision dated October 22, 1999.

By decision dated February 10, 2000, the Office denied appellant's request for a review of the written record. The Office found that the request was not timely filed. Appellant was informed that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issues in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

The Board finds that appellant has no more than a two percent impairment of the right lower extremity.

Section 8107 of the Federal Employees' Compensation Act specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage of loss of a member, function or organ shall be determined. The method used in making such a determination is a matter, which rests in the sound discretion of the Office.[2] For consistent

[1] The record indicates that appellant also had an accepted left knee injury for which he received, in an April 21, 1999 decision, a schedule award for a two percent permanent impairment. The April 21, 1999 Office decision is not before the Board in the present appeal as appellant did not file his appeal until May 9, 2000. Consequently, the Board lacks jurisdiction to review that decision. *See* 20 C.F.R. §§ 501.2(c), 501.3(d).

[2] *Daniel C. Goings,* 37 ECAB 781 (1986); *Richard Beggs,* 28 ECAB 387 (1977).

results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, as the standard for determining the percentage of permanent impairment and the Board has concurred in such adoption.[3]

On appeal appellant alleges that he is entitled to a schedule award greater than the two percent impairment rating granted by the Office.

Although the Office in it's August 7, 1998 letter, asked Dr. Mochizuki to provide an impairment rating for both legs, he only provided a rating for the left leg. Thus, it was proper for the Office to refer the matter to its Office medical adviser for a determination regarding impairment of the right leg.[4]

The Office medical adviser utilized the findings in Dr. Mochizuki's reports and treatment notes to determine appellant's impairment rating for the right lower extremity. The Office medical adviser noted that on April 22, 1992 Dr. Mochizuki performed a right knee arthroscopy with partial medial meniscectomy; arthroscopic shaving of the medial femoral condyle and arthroscopic synovectomy. The operative report indicated a Grade II chondromalacia involving an area of less than one centimeter about the medial compartment, with the lateral meniscus normal. Dr. Mochizuki indicated that appellant reached maximum medical improvement after surgical intervention. The Office medical adviser noted that Dr. Mochizuki reported subjective complaints of appellant of aching in the knee, with inability to run more than short distances. These complaints would be graded at a maximal Grade II per Chapter 3 of the A.M.A., *Guides.* The Office medical adviser indicated this would be a 25 percent grade of a maximal seven percent (femoral nerve), equivalent to two percent impairment for pain factors.[5] The Office medical adviser noted Dr. Mochizuki's figures for range of motion of 0/0 to 128/134, which would be rated at 0 per Chapter 3, Table 41, of the A.M.A., *Guides.* The records indicated no atrophy or weakness for a zero percent impairment.

The Office medical adviser noted a second method for calculating an award based on the Diagnosis Based Estimates, using Table 64 of the A.M.A., *Guides* (4th ed. 1993). The Office medical adviser indicated a partial medial meniscectomy was performed which is equivalent to a two percent impairment rating, taken from Chapter 3, page 84, Table 64 of the A.M.A., *Guides*. Based on Dr. Mochizuki's findings no additional values would be added for loss of function due to pain and/or loss of sensation, loss due to limited motion or loss due to atrophy/weakness. The Office medical adviser determined the final award to be a two percent impairment of the right lower extremity. The Office medical adviser noted that appellant's date of maximum medical improvement was October 7, 1992, the date Dr. Mochizuki indicated appellant reached maximum medical improvement from surgical intervention and was able to walk his seven to eight mile mail route.

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[3] *Henry L. King,* 25 ECAB 39 (1973); *August M. Buffa,* 12 ECAB 324 (1961), *Francis John Kilcoyne,* 38 ECAB 168 (1987).

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims,* Chapter 2.808.6(d) (March 1995) (Medical evidence should be sent to an Office medical adviser for calculation of permanent impairment under the A.M.A., *Guides*).

[5] *See* page 77, Table 39; page 89, Table 68; and page 151, Table 20 of the A.M.A., *Guides.*

The Board finds that the Office medical adviser properly applied Dr. Mochizuki's findings to the A.M.A., *Guides* in calculating appellant's permanent impairment.

The Office medical adviser properly applied the A.M.A., *Guides* to the information provided in Dr. Mochizuki's report and reached an impairment rating of two percent.[6] This evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than a two percent permanent impairment of the right lower extremity. There is no evidence conforming to the A.M.A., *Guides*, which supports that appellant has a higher percentage of impairment.

The Board further finds that the Office did not abuse its discretion in denying appellant's untimely request for a review of the written record.

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office's final decision.[7] The Office's regulations expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing."[8] The Office provided that such review of the written record is also subject to the same requirement that the request must be made within 30 days of the Office's final decision.[9]

The Office properly found that appellant's request for a review of the written record was untimely. His December 18, 1999 request for review of the written record was made more than 30 days after the Office's October 22, 1999 decision.

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[10] The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion, to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration or an oral hearing, are a proper interpretation of the Act and Board precedent.[11]

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[6] Although the Office medical adviser noted a two percent impairment for pain under Table 39 and also a two percent impairment for a partial medial meniscectomy under Table 64, these percentages would result in overlapping applications and should not be combined or added. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700, Ex. 4 (October 1995).

[7] 5 U.S.C. § 8124(b).

[8] *See* 20 C.F.R. §§ 10.615-10.616 (1999).

[9] *Id.*

[10] *Herbert Holley*, 33 ECAB 140 (1981).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601 (October 1992).

The Board finds that the Office properly exercised its discretion by further denying appellant's request, upon finding that he could have the matter further addressed by the Office through a reconsideration request along with the submission of new medical evidence.[12]

The February 10, 2000 and October 22, 1999 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
May 7, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[12] With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).