U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARK MARQUEZ and DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, BORDER PATROL, Bakersfield, CA

Docket No. 00-2759; Submitted on the Record;
Issued September 6, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has more than a 10 percent permanent impairment of the right knee for which he has received a schedule award.

On July 10, 1997 appellant, then a 37-year-old border patrol agent, injured his right knee while in pursuit of an illegal alien. The Office of Workers' Compensation Programs accepted the claim for a right knee strain, right knee torn meniscus and right knee arthroscopy. The Office authorized arthroscopic surgery to repair the tear of the medial and lateral meniscus knee injury.

Appellant submitted several reports from Dr. Nicholas Valos, an orthopedic surgeon, and a magnetic resonance imaging (MRI) scan dated August 15, 1997. Dr. Valos diagnosed appellant with medial and lateral meniscus tears of the right knee and recommended surgery. The MRI scan revealed stellate tears at the posterior horn of the right medial horn and lateral menisci.

In an October 16, 1997 operative report, Dr. Valos, noted performing an arthroscopic with partial medial meniscetomy. In progress notes, he indicated that appellant was healing properly. In a report dated May 12, 1998, he noted appellant was released to work without limitation; however, he was not permanent and stationary at this time.

On May 13, 1998 appellant filed a claim for a schedule award. He submitted a June 16, 1998 disability evaluation report from Dr. Valos, which indicated that appellant reached maximum medical improvement as of June 16, 1998 and was permanent and stationary. Dr. Valos noted upon examination that the right knee had full extension; flexion of 120 degrees for the right knee and 125 for the left knee; mild varus/valgus laxity; no anterior/posterior laxity; mild medial joint line tenderness; and no evidence of an effusion. He did not make a determination on impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (fourth edition 1993).

Dr. Valos' report and the case record were referred to the Office's medical adviser who determined that appellant sustained a two percent impairment of the right lower extremity.

In a decision dated October 16, 1998, the Office granted appellant a schedule award for a two percent permanent impairment of the right lower extremity.

On June 25, 1999 appellant filed a claim alleging that he injured his right knee while performing exercise drills. The Office accepted the claim for a right knee strain and right knee arthroscopy. The Office authorized arthroscopic surgery to repair the tear of the medial and lateral meniscus knee injury.

Appellant submitted various medical records including a June 29, 1999 x-ray of the right knee; a medical report from Dr. Rocco Calderone, a Board-certified orthopedic surgeon, dated August 10, 1999; and an operative report dated December 8, 1999. The x-ray of the right knee revealed a suprapatellar joint effusion. The medical report from Dr. Calderone dated August 10, 1999 diagnosed appellant with probable medial meniscal tear, right knee; and chondromalacia, lateral femoral condyle, right knee. He noted upon physical examination tenderness to palpation along the medial joint-line of the right knee; mild to moderate effusion of the right knee; crepitus with range of motion of the right knee; range of motion for the right knee was 0 to 125 degrees and the left knee 0 to 140 degrees; and a positive McMurray's sign. Dr. Calderone recommended arthroscopic surgery which was performed on December 8, 1999. In the December 8, 1999 operative report, he noted performing a right knee arthroscopy with partial medial meniscectomy and right knee arthroscopy with abrasion chondroplasty of the lateral femoral condyle and trochlear groove. In progress notes thereafter, Dr. Calderone indicated that appellant was healing properly and undergoing physical therapy.[1]

Thereafter, Dr. Calderone submitted a March 17, 2000 work evaluation form and a June 2, 2000 disability evaluation report. In the work evaluation form, he indicated that appellant could return to work full time with restrictions. The June 2, 2000 disability evaluation from Dr. Calderone indicated that appellant reached maximum medical improvement as of June 2, 2000 and was permanent and stationary. Dr. Calderone noted upon examination range of motion was 0 to 120 degrees for the right knee and 0 to 135 for the left knee; slight tenderness along the lateral joint line; and no evidence of an effusion. He noted that appellant was estimated to have lost approximately 25 percent of his preinjury capacity for lifting, bending, stooping and prolonged climbing.

On June 13, 2000 appellant filed a claim for a schedule award.

On June 30, 1999 the Office requested that Dr. Calderone evaluate appellant for permanent impairment arising from his accepted employment injury in accordance with the A.M.A., *Guides* (fourth edition 1993). Dr. Calderone determined that the date of maximum medical improvement was June 2, 2000. He noted that there was mild right knee pain; mild pain with prolonged standing and prolonged running; mild weakness of the right knee rated at Grade 4+; there was evidence of loss of function due to mild pain and discomfort in the right knee; and

[1] The Office doubled both of appellant's right knee claims numbers 131192871 and 131133602.

minimal weakening of the right knee. Dr. Calderone noted appellant sustained a loss of function of 10 degrees as flexion for the right knee was 125 degrees and the left knee was 135 degrees.

Dr. Calderone's report and the case record were referred to the Office's medical adviser who determined that appellant sustained a 10 percent impairment of the right lower extremity.

In a decision dated August 4, 2000, the Office granted appellant a schedule award for a 10 percent impairment of the right lower extremity, less the 2 percent previously awarded.

The Board finds that appellant has no more than a 10 percent impairment of the right lower extremity.

The schedule award provisions of the Act[2] and its implementing regulation[3] 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

On appeal, appellant contends he has a 25 percent impairment of the right lower extremity. He indicated that Dr. Calderone's determination that he sustained a 25 percent loss of preinjury capacity entitled him to a 25 percent impairment rating.

In his report dated June 2, 2000, Dr. Calderone noted that appellant was estimated to have lost approximately 25 percent of his preinjury capacity for lifting, bending, stooping and prolonged climbing. He noted that there was mild right knee pain; mild pain with prolonged standing and prolonged running; mild weakness of the right knee rated at Grade 4+; loss of function due to mild pain and discomfort in the right knee; loss of function of 10 degrees of flexion of the right knee; and minimal weakening of the right knee. However, Dr. Calderone did not make a determination on impairment in accordance with the A.M.A., *Guides*. Although, he noted appellant lost 25 percent of his preinjury capacity for lifting, bending, stooping and prolonged climbing, he did not provide a numerical impairment rating in conformance with the A.M.A., *Guides*. Dr. Calderone neither referenced the A.M.A., *Guides* nor did he cite to tables or charts for an impairment rating determination. Thus it was proper for the Office to refer the matter to its medical adviser.[4]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] It is well settled that when an attending physician's report gives an estimate of permanent impairment but does not indicate that the estimate is based on the application of the A.M. A. *Guides*, the Office may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*. Board cases are clear that if an attending physician does not utilize the A.M.A., *Guides*, his opinion is of diminished probative value in establishing the degree of any permanent impairment. *Paul R. Evans, Jr.*, 44 ECAB 646 (1993).

The Office medical adviser who reviewed Dr. Calderone's report correlated findings from Dr. Calderone's report to specific provisions in the A.M.A., *Guides.* The Office medical adviser noted Dr. Calderone's physical findings in his report dated June 2, 2000 which demonstrated appellant had mild right knee pain that increased to moderate with prolonged standing and running; weakness was noted as mild at 4+; the right knee indicated slight limitation of range of motion, with the final 10 degrees of knee flexion limited; minimal weakness of the right knee was noted and range of motion of 0/0 through 125/135. He indicated that appellant had a maximal Grade 3 pain and/or altered sensation which interfered with function, which he determined to be 60 percent and cited to Table 11(a), page 48 of the A.M.A., *Guides.* The Office medical adviser further noted the maximum percentage of impairment allowed for the femoral nerve was seven percent. Pursuant to the procedure scheme set forth in Table 11(b), page 48 of the A.M.A., *Guides,* the medical adviser multiplied the severity of the sensory deficit, 60 percent,[5] by the maximum impairment value, 7 percent,[6] and obtained a 4 percent impairment for each structure (4.2 percent rounded to 4 percent.) The Office medical adviser noted that range of motion of the right knee was 0/0 through 125/135, which results in a 0 percent rating.[7] He indicated that the weakness was described as minimal-mild of 4+/5 which would result in a rating between a Grade IV or 12 percent and a Grade V or zero percent, per Table 39, page 77 of the A.M.A., *Guides.* The Office medical adviser recommended an average of these, for a six percent impairment. He further noted that utilizing the Combined Values Chart,[8] the six percent impairment for weakness is combined with the 0 percent impairment for loss of motion, combined with the 4 percent for pain factors would be equivalent to a 10 percent impairment of the right lower extremity.

The Board finds that the Office medical adviser properly applied the A.M.A., *Guides* in finding that appellant had a 10 percent impairment of the right lower extremity due to his employment-related condition. The Office noted appellant was previously granted a schedule award for 2 percent impairment for the right lower extremity and therefore properly reduced this award of compensation to 8 percent, for a total award of compensation of 10 percent impairment for the right lower extremity.

The Board therefore finds that the weight of the evidence rests with the calculations of the Office medical adviser. Appellant is therefore entitled to a schedule award for no more than the additional eight percent impairment for the right lower extremity.

[5] *See* Table 11(a), page 48 of the A.M.A., *Guides.*

[6] *See* Table 68, page 89 of the A.M.A., *Guides.*

[7] *See* Table 41, page 78 of the A.M.A., *Guides.*

[8] Page 322 of the A.M.A., *Guides.*

The decision of the Office of Workers' Compensation Programs dated August 4, 2000 is hereby affirmed.

Dated, Washington, DC
September 6, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member