

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WINSTON GILMORE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Tuscaloosa, AL

*Docket No. 03-458; Submitted on the Record;
Issued April 4, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant has more than a 12 percent impairment to the right leg for which he has received a schedule award.

On October 29, 1999 appellant, then a 43-year-old nurse's assistant, filed a claim for traumatic injury, alleging that on that day he sustained a sharp pain from his right knee to upper thigh while attempting to subdue a combative patient.

The Office of Workers' Compensation Programs accepted appellant's claim for a ruptured quadriceps tendon of the right leg and authorized surgical repair. The Office also paid appropriate compensation benefits and authorized physical therapy.

In a report dated November 8, 1999, Dr. Bony Fields Barrineau, an attending Board-certified orthopedic surgeon, stated that he had performed a surgical repair of appellant's ruptured quadriceps tendon, right knee.

On October 31, 2000 appellant filed a claim for a schedule award.¹

By letter dated November 13, 2000, the Office requested that Dr. Barrineau provide an impairment rating based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993).

In a report dated December 21, 2000, Dr. Barrineau evaluated appellant's right lower extremity impairment at zero percent.

¹ On May 30, 2000 appellant filed a claim for a recurrence of disability, alleging that, on May 18, 2000, his pain increased. The record does not include a final Office decision on this claim and thus is not before the Board.

By decision dated February 2, 2001, the Office denied appellant's claim for a schedule award based on Dr. Barrineau's December 21, 2000 report.²

On August 27, 2001 appellant filed a second claim for a schedule award and submitted additional medical reports.³

In a report dated April 4, 2001, Dr. Dewey Jones, III, appellant's treating Board-certified orthopedic surgeon, stated that he had examined appellant on that date, had reviewed a January 2001 magnetic resonance imaging (MRI) scan taken at the University of Alabama, Birmingham, noted that appellant was post quadriceps repair, and had reached maximum medical improvement as of that date.

In a report dated May 24, 2001, Ronald T. Richardson, a physical therapist, evaluated appellant on behalf of Dr. Jones for an impairment rating. Based on the fourth edition of the A.M.A., *Guides*, Mr. Richardson determined that appellant had 125 degrees of retained flexion of the right knee for which there was a 0 percent impairment. He also noted that manual muscle testing of the right quadriceps measured 4 by 5 and that, according to Table 39, page 77 of the A.M.A., *Guides*, a Grade 4 weakness resulted in a 12 percent impairment of the right lower extremity.⁴

In a report dated August 17, 2001, Dr. Jones stated that appellant had reached maximum medical improvement on April 4, 2001, that he had retained active flexion of the right knee of 125 degrees and retained extension of 0 degrees. He added that there was an additional impairment of function due to weakness, atrophy, pain or discomfort estimated at 12 percent of the right lower extremity.

By letter dated October 3, 2001, the Office advised appellant to refer to his appeal rights that were included in the final decision dated and issued in his case.

In a letter received by the Office on October 12, 2001, appellant requested an oral hearing. By letter decision dated November 9, 2001, the Office denied appellant's request on the grounds that his request was made more than 30 days from February 2, 2001, the date of the Office's last decision, and thus his request was untimely filed. The Office also advised appellant that "the issue in this case can be equally well addressed by requesting reconsideration."

In a letter received by the Office on December 3, 2001, appellant requested reconsideration.

² Appellant returned to light duty on January 12, 2000 and full duty on February 14, 2000. In a letter dated February 27, 2001, the employing establishment stated that appellant stopped work on September 29, 2000 and, in a follow-up letter dated December 31, 2001, noted that he retired effective March 3, 2001.

³ In a letter dated August 31, 2001, the employing establishment requested a second opinion "since there is a variance in the percentage of impairment rating."

⁴ A.M.A., *Guides* at 77 (4th ed. 1993), Table 39.

On December 18, 2001 the Office referred appellant's medical record to an Office medical adviser to determine whether appellant was entitled to a schedule award. The Office noted that the physical therapist's May 24, 2001 report was based on the A.M.A., *Guides* (4th ed. 1993).

In a report dated December 20, 2001, the Office medical adviser stated that, based on the A.M.A., *Guides* (5th ed. 2001), Table 17.8,⁵ appellant had a 12 percent right lower extremity impairment for weakness, "because of the complete rupture of the quadriceps requiring open repair."

By decision dated February 7, 2002, the Office granted appellant a schedule award for a 12 percent impairment of the right lower extremity.

The Board finds that appellant has failed to establish that he sustained more than a 12 percent impairment of the right lower extremity for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act⁶ and its implementing regulation⁷ 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.⁸

In this case, the Office medical adviser relied on the findings of appellant's treating physician based on a physical therapist's evaluation rating. The Office medical adviser stated that, based on the A.M.A., *Guides* (5th ed. 2001), an open quadriceps tendon repair rates a 12 percent impairment of the right lower extremity. Appellant presented no evidence that he was entitled to more than a 12 percent schedule award.

⁵ A.M.A., *Guides* at 532 (5th ed. 2001), Table 17.8.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

The decision of the Office of Workers' Compensation Programs dated February 7, 2002 is affirmed.

Dated, Washington, DC
April 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member