United States Department of Labor
Employees' Compensation Appeals Board

PAUL M. HARKINS, Appellant	)	
and	)	**Docket No. 04-1847**
	)	**Issued: December 16, 2004**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Washington, DC, Employer	)	

Appearances:
Paul M. Harkins, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 16, 2004 appellant filed a timely appeal of the June 17, 2004 decision of the Office of Workers' Compensation Programs, which denied his claim for an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the June 17, 2004 schedule award.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of the right lower extremity, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that appellant sustained a right knee sprain while in the performance of duty on April 6, 1998. The claim was later expanded to include a torn right medial meniscus. The Office authorized arthroscopic surgery, which appellant underwent on April 29, 1999. By decision dated June 30, 2000, the Office granted a schedule award for a two percent permanent

impairment of his right lower extremity. The Board affirmed the June 30, 2000 schedule award in a decision dated June 5, 2001.[1]

On March 24, 2003 appellant filed a claim for an additional schedule award. He submitted a March 20, 2003 report from Dr. Daniel R. Ignacio, a Board-certified physiatrist, who found that appellant had a 45 percent impairment of the right lower extremity.

In a report dated May 29, 2003, Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and Office referral physician, found a two percent impairment of the right lower extremity based upon appellant's April 29, 1999 partial medial meniscectomy.

By decision dated October 6, 2003, the Office denied appellant's claim for an additional schedule award. The Office relied on Dr. Draper's opinion because Dr. Ignacio failed to explain the basis for the 45 percent impairment rating.

Appellant requested a review of the written record and submitted an October 29, 2003 supplemental report from Dr. Ignacio, who identified the various components of his impairment rating and the specific tables utilized in calculating a 45 percent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

In a decision dated April 7, 2004, the Office hearing representative set aside the October 6, 2003 decision and remanded the case for referral to an Office medical adviser for an opinion on the extent of appellant's impairment.

In a report dated April 29, 2004, the Office medical adviser concurred with Dr. Draper's impairment rating of two percent. With respect to Dr. Ignacio's 45 percent impairment rating, the Office medical adviser stated that clearly there was no basis for the rating and it did not relate in any way whatsoever to appellant's partial medial meniscectomy.

By decision dated June 17, 2004, the Office denied appellant's claim for an additional schedule award. The Office relied upon Dr. Draper's opinion and noted that the Office medical adviser reviewed the record and concurred with Dr. Draper's finding of two percent impairment. Because appellant had previously received a schedule award for a two percent impairment of the right lower extremity, he was not entitled to additional compensation.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use, of specified members, functions and organs of the body.[2] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform

[1] Docket No. 00-2348 (issued June 5, 2001). The Board's June 5, 2001 decision is incorporated herein by reference.

[2] The Act provides that for a total or 100 percent loss of use, of a leg, an employee shall receive 288 weeks of compensation. 5 U.S.C. § 8107(c)(2).

standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[3] Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).[4]

A claim for an increased schedule award may be based on new exposure to employment factors.[5] Absent any new exposure, a claim for an increased schedule award may also be based on medical evidence indicating that the progression of an employment-related condition has resulted in a greater permanent impairment than previously calculated.[6]

ANALYSIS

The Board finds that the case is not in posture for a decision as there is an unresolved conflict of medical opinion. The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[7] Dr. Draper, the Office referral physician, determined that appellant had a two percent permanent impairment based on his April 29, 1999 partial medial meniscectomy. The Office medical adviser agreed that this was a proper impairment rating pursuant to the diagnosis-based estimates under Table 17-33.[8] In an October 29, 2003 supplemental report, Dr. Ignacio explained that appellant's 45 percent impairment rating was based, among other things, on a loss of range of motion in the knee, which he estimated as a 10 percent impairment.[9] He also found a 10 percent impairment for peripheral nerve impairment involving the peroneal nerve. Additionally, Dr. Ignacio identified impairment due to post-traumatic arthritis, muscular wasting and atrophy and chronic pain. Although some of the impairments addressed by Dr. Ignacio cannot properly be combined under the A.M.A., *Guides* (5th ed. 2001),[10] he addresses medical evidence beyond the diagnosis-based estimate allowed for the partial meniscectomy. The Office medical adviser expressed the opinion that Dr. Ignacio's impairment rating did not correlate to the accepted meniscectomy. He did not address why the diagnosis-based estimates under Table 17-33 were more reflective of impairment instead of loss of range of motion under Table 17-10. He also did not discuss arthritis under Table 17-31 or nerve deficit impairment under Table 17-37.

The Board finds an unresolved conflict of medical opinion between appellant's treating physician, Dr. Ignacio and the Office's referral physician, Dr. Draper. The Office's June 17,

[3] 20 C.F.R. § 10.404 (1999).

[4] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (January 29, 2001).

[5] *Linda T. Brown*, 51 ECAB 115 (1999).

[6] *Id.*

[7] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[8] A.M.A., *Guides* 546, Table 17-33.

[9] Dr. Ignacio referenced Tables 13-22, 13-23, 17-6, 17-10, 17-31 and 17-33 as the basis for his impairment rating.

[10] *See* A.M.A., *Guides* 526, Table 17-2.

2004 decision will be set aside and the case remanded to the Office for referral to an impartial medical examiner. The impartial medical specialist should be requested to address whether the diagnosis-based estimate is more appropriate for assigning an impairment rating than on the basis of physical findings. After such further development of the record, the Office shall issue a *de novo* decision regarding appellant's entitlement to an additional schedule award.

CONCLUSION

The Board finds that the case is not in posture for a decision regarding appellant's entitlement to an additional schedule award.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2004 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 16, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member