United States Department of Labor
Employees' Compensation Appeals Board

MICHAEL G. JOHNSON, Appellant	)	
and	)	**Docket No. 04-1891**
	)	**Issued: December 10, 2004**
DEPARTMENT OF HOMELAND SECURITY, U.S. BORDER PATROL, Calexio, CA, Employer	)	

Appearances:
Michael G. Johnson, 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 21, 2004 appellant filed a timely appeal from a May 19, 2004 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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. On appeal he challenges the amount of the award and the pay rate used for compensation purposes.

FACTUAL HISTORY

On October 1, 2002 appellant, then a 38-year-old senior patrol agent, filed a claim for an injury to his right knee in the performance of duty. The Office accepted his claim for a right knee sprain and meniscus tear. Appellant received continuation of pay on October 8, 10 and 16, 2002. He worked in a light-duty capacity subsequent to his injury.

A magnetic resonance imaging (MRI) scan of appellant's right knee, performed on October 10, 2002 revealed a probable tear of the posterior horn of the medial meniscus.

On November 19, 2002 Dr. Thomas W. Harris, an orthopedic surgeon, performed a right knee arthroscopy with a partial medial meniscectomy, synovcectomy and chondroplasty of the trochlea with microfracture technique. The Office paid appellant compensation for temporary total disability beginning November 18, 2002. The Office paid a weekly base pay rate of $899.90 until it obtained information from the employing establishment regarding his Sunday pay, night differential and administratively uncontrolled overtime.

By letter dated December 27, 2002, the employing establishment provided the Office with appellant's average hours per week of night pay, Sunday pay and administratively uncontrolled overtime for one year prior to the date of injury. The Office recalculated his weekly pay rate as $1,161.63 and paid him supplemental compensation from November 18, 2002 to January 17, 2003 in the amount of $1,710.53.

Appellant returned to modified employment on January 21, 2003. On August 31, 2003 he filed a claim for a schedule award. Appellant submitted an impairment evaluation dated April 29, 2003 from Dr. Harris, who diagnosed a meniscus tear and chondromalacia of the right knee. He noted that appellant reported no further knee pain and opined that he had reached maximum medical improvement on April 29, 2003. On physical examination, Dr. Harris found no effusion, tenderness or muscle spasm and listed range of motion for the knees bilaterally as 0 to 135 degrees. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) to his findings, Dr. Harris stated:

> "Using page 546, [T]able 17-33, [appellant] has a two percent right lower extremity impairment secondary to his partial medial meniscectomy. Additionally, utilizing page 544, [T]able 17-31, [he] has [G]rade 4 chondromalacia of the trochlea evidenced at the time of surgery on November 19, 2002. This combined with [appellant's] lack of subjective factors of disability provides [him] with a right lower extremity impairment of seven percent."

By letter dated October 27, 2003, the Office referred appellant to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, for a second opinion regarding the degree of permanent impairment of the right lower extremity.

In a report dated November 17, 2003, Dr. Sabourin found that appellant had no instability, tenderness, swelling, crepitus or effusion of the knee and had normal strength and sensation. He listed range of motion findings of the right and left knee of 0 to 145 degrees. Dr. Sabourin found that x-rays revealed "very slight narrowing of the medial joint space of the right knee with no bony changes." He diagnosed a tear of the medial meniscus of the right knee and chrondromalacia of the medial femoral condyle. Dr. Sabourin noted that appellant was "status post arthroscopic surgery with partial meniscectomy and debridement of right knee medial compartment." He listed findings of atrophy of the right knee, 45 centimeters of the right as opposed to 46 centimeters on the left. On a form accompanying his report, Dr. Sabourin indicated that appellant had knee pain in the uncomfortable range that interfered with running

and using stairs. He also marked "cartilage" in response to a question of whether appellant had a post-traumatic irregularity or arthritis. Dr. Sabourin stated, "[Appellant] does have a problem with his right knee. He had not only a tear of the meniscus but evidently damaged some of the hyaline cartilage covering the bone itself." He opined that appellant reached maximum medical improvement on June 1, 2003.

An Office medical adviser reviewed the reports of Dr. Harris and Dr. Sabourin on March 8, 2004. He found that appellant had a two percent impairment of the right lower extremity due to a partial medial meniscectomy.[1] The Office medical adviser noted that the impairment due to the medial meniscectomy was the sole impairment of the right lower extremity resulting from the work injury of October 5, 2001. He listed November 13, 2003 as the date of maximum medical improvement.

By decision dated May 19, 2004, the Office granted appellant a schedule award for a two percent permanent impairment of the right lower extremity. The period of the award ran for 5.76 weeks from November 13 to December 23, 2003. The Office calculated appellant's pay rate as $1,161.63 per week.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standards applicable to all claimants.[4] The Office procedures direct the use of the fifth edition of the A.M.A., *Guides,* issued in 2001, for all decisions made after February 1, 2001.[5]

Proceedings under the Act are not adversarial in nature, nor is the Office a disinterested arbiter.[6] While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[7] Once the Office starts to develop the medical opinion evidence, it must do so in a fair manner.[8] The

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

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] 20 C.F.R. § 10.404(a).

[5] *See* FECA Bulletin No. 01-05 (issued January 20, 2001).

[6] *Leon Thomas*, 52 ECAB 202 (2001).

[7] *Id*.

[8] *William N. Saathoff*, 8 ECAB 769 (1956).

Office has the responsibility to obtain from a referral physician an evaluation that will resolve the issue involved in the case.[9]

ANALYSIS

In this case, Dr. Harris found that appellant had a two percent impairment of the right lower extremity due to his partial medial meniscectomy according to Table 17-33 on page 546 of the A.M.A., *Guides*. He further determined that, utilizing Table 17-31 on page 544 of the A.M.A., *Guides*, appellant had Grade 4 chondromalacia of the trochlea as seen during his November 19, 2002 surgery. Dr. Harris noted that appellant had no subjective factors of impairment such as effusion, tenderness of the patellofemoral joint of muscle spasm. He concluded that appellant had a seven percent total impairment of the right lower extremity. The Board notes, however, that Table 17-31 on page 544 of the A.M.A., *Guides*, entitled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals" is the only table provided for determining an impairment resulting from an arthritic condition to the lower extremity. As there is no table provided for determining the impairment due to arthritis based on visualization, it is not clear how Dr. Harris determined the appropriate percentage to apply to appellant's condition.[10] His opinion, therefore, does not conform to the A.M.A., *Guides*.[11]

The Office referred appellant to Dr. Sabourin for a second opinion evaluation. He noted that appellant had no instability, tenderness, effusion or crepitus. Dr. Sabourin further found that appellant had no loss of strength or sensation. He interpreted x-rays obtained of appellant's right knee as revealing narrowing of the medial joint space. Dr. Sabourin listed findings of atrophy of the right knee, 45 centimeters of the right as opposed to 46 centimeters on the left. He indicated that appellant had knee pain in the uncomfortable range which interfered with running and using stairs and further checked "cartilage" in response to a question regarding whether appellant had post-traumatic irregularity or arthritis. Dr. Sabourin diagnosed a meniscus tear and chondromalacia and opined that appellant had torn cartilage over his knee at the time of his employment injury.

The Office medical adviser reviewed the reports of Dr. Harris and Dr. Sabourin and found that appellant had a two percent permanent impairment of the right lower extremity based on his partial medial meniscectomy according to Table 17-33 on page 546 of the A.M.A., *Guides*. He stated that the impairment due to the meniscectomy was the only impairment due to appellant's employment injury.[12] The Board notes, however, that Dr. Sabourin, the referral

[9] *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

[10] Table 17-31 on page 544 of the A.M.A., *Guides* also provides for a five percent lower extremity impairment for an individual with a "history of direct trauma, a complaint of patellarfemoral pain and crepitation on physical examination, but without joint space narrowing on x-ray…." In this case, however, Dr. Harris found that appellant had no subjective complaints of pain and thus, the five percent impairment which can be found without x-ray evidence of joint space narrowing is not applicable.

[11] *See Norman D. Armstrong*, 55 ECAB ___ (Docket No. 04-306, issued June 23, 2004).

[12] The Office medical adviser properly did not include an impairment for atrophy as Table 17-2, the cross-usage chart provides that an impairment based on a diagnostic-based estimate, such as an impairment for a partial medial meniscectomy, cannot be combined with an impairment due to atrophy. A.M.A., *Guides* at 526, Table 17-2.

physician, obtained x-rays of appellant's right knee and stated that he had joint space narrowing and checked that he had a problem affecting his cartilage on an impairment evaluation form. While the Office medical adviser found that appellant's partial medial meniscectomy was the only impairment due to his employment injury, the Board has held that in calculating a schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments of that member must be included.[13] Consequently, the Office must take into account all of appellant's right knee impairments in calculating his schedule award.

Proceedings before the Office are not adversarial in nature and the Office is not a disinterested arbiter. In a case where the Office "proceeds to develop the evidence and to procure medical evidence, it must do so in a fair and impartial manner."[14] In this case, the Office proceeded to develop the evidence and obtained a second opinion examination by Dr. Sabourin, who found that appellant had evidence of joint space narrowing by x-ray and diagnosed chondromalacia. The case will be remanded for the Office to request that Dr. Sabourin provide an opinion on whether appellant has any impairment due to arthritis of the right knee based on roentgenographically determined cartilage intervals in accordance with Table 17-31 on page 544 of the A.M.A., *Guides*. After such further development as the Office deems necessary it shall issue a *de novo* decision.

On appeal appellant questioned whether the Office's determination of his pay rate for compensation purposes included his Sunday pay and night differential. When the job held at the time of injury includes elements of pay such as night or shift differential, extra compensation for work on Sundays and holidays or pay for administratively uncontrollable overtime, the Office must include the additional pay in the base pay.[15] In this case, the Office received information from the employing establishment regarding appellant's night shift differential and administratively uncontrollable overtime for the year preceding his injury.[16] The Office properly recalculated appellant's pay rate for compensation purposes based on this information.[17] The Office added appellant's average weekly earnings for night differential of $38.69, his average weekly Sunday premium pay of $5.66 and his average administratively uncontrolled overtime pay of $217.28, to his base pay rate of $899.90 per week to find a total weekly pay rate of $1,161.63.[18] The Board finds that the pay rate determination made by the Office is correct.

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[13] *Lela M. Shaw*, 51 ECAB 372 (2000).

[14] *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985).

[15] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.8(b) (December 1995).

[16] The Office properly based appellant's compensation on his date of injury as he had disability for employment for which he received continuation of pay at the time of injury. *See* 5 U.S.C. § 8101(4).

[17] The employing establishment indicated that, for the year preceding the injury, appellant received an average of 17.78 hours of night differential per week, 7.53 hours of Sunday pay and 7.21 hours of administratively uncontrolled overtime. The employing establishment further noted that appellant averaged 40 hours per week of work.

[18] Basic compensation is defined under 5 U.S.C. §§ 8105, 8106 and 8107 as being 66 2/3 of an employee's monthly pay. As appellant has at least one dependent, his compensation for his schedule award is payable at 75 percent of his pay. *See* 5 U.S.C. § 8110(b); 20 C.F.R. § 10.404(b).

CONCLUSION

The Board finds that the case is not in posture for a decision as further development of the medical evidence is necessary to determine the extent of appellant's permanent impairment of the right leg.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 19, 2004 is set aside and the case is remanded for further proceedings consistent with this decision by the Board.

Issued: December 10, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member