United States Department of Labor
Employees' Compensation Appeals Board

DAVID C. MOSS, Appellant	)	
and	)	**Docket No. 04-5**
	)	**Issued: January 28, 2004**
TENNESSEE VALLEY AUTHORITY, GALLATIN FOSSIL PLANT, Gallatin, TN, Employer	)	

Appearances:
David C. Moss, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 29, 2003 appellant filed a timely appeal from a September 11, 2003 decision of the Office of Workers' Compensation Programs which granted a schedule award for a two percent impairment of the left leg. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award in this case.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of the left lower extremity.

FACTUAL HISTORY

On March 25, 2002 appellant, then a 54-year-old machinist, filed a traumatic injury claim, alleging that on March 21, 2002 he fell at work, hitting his head and left knee and twisting his back and left ankle. He did not stop work. On May 21, 2002 the Office accepted that appellant sustained an employment-related contusion and tear of the medial meniscus of the left

knee. Arthroscopic surgery was authorized, which was performed on June 5, 2002 by Dr. Roy O. Terry, a Board-certified orthopedic surgeon. The surgical report noted tears of the medial and lateral meniscus, which were debrided back to stable tissue.

On August 9, 2003 appellant filed a claim for a schedule award and submitted a November 27, 2002 report from Dr. David W. Gaw, a Board-certified orthopedic surgeon, who rated impairment to appellant's back and left leg under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[1] Dr. Gaw provided range of motion findings for the left knee, noting that appellant had complete extension and flexion past 110 degrees. He determined that appellant's back impairment represented 26 percent of the whole person and that his left lower extremity impairment totaled 4 percent of the whole person or 10 percent of the lower extremity.[2] Dr. Gaw combined the back and lower extremity impairments to find a total of 29 percent impairment of the whole body. Appellant also submitted an August 4, 2003 form report from Dr. Terry who noted that appellant was status post knee surgery. Dr. Terry rated the impairment to appellant's left leg as two percent. In an August 15, 2002 report, Dr. Terry reiterated that, under the A.M.A. *Guides*, appellant had a two percent impairment based on his left knee surgery. He noted that there was no evidence of a recurrent tear on magnetic resonance imaging (MRI) scan.[3]

In an August 20, 2003 report, Dr. Harry L. Collins, Jr., an Office medical adviser, noted that Dr. Terry provided a two percent impairment rating of the left lower extremity based on a partial mensicectomy. He opined that this was consistent with Table 17-33 of the A.M.A., *Guides,* at page 546. Dr. Collins noted that maximum medical improvement had been reached on August 4, 2003.

In a September 11, 2003 decision, the Office granted a schedule award for a 2 percent impairment of the left lower extremity, or a total of 5.76 weeks of compensation, to run from August 4 to September 13, 2003.

LEGAL PRECEDENT

Under section 8107 of the Federal Employees' Compensation Act[4] and section 10.404 of the implementing federal regulations,[5] schedule awards are payable for permanent impairment of

[1] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

[2] Dr. Gaw noted that appellant underwent surgery on October 6, 2000 for an L3-4 discectomy, with a history of a previous low back surgery in 1984.

[3] A presurgery MRI scan done on May 20, 2002 demonstrated a horizontal cleavage tear of the body and posterior junction of the lateral meniscus. The report further noted that medially there was an intrameniscal signal "which comes close to but does not definitely contact the articular surface and thus does not meet strict MRI [scan] criteria for a tear medially." A post-surgery MRI scan dated August 15, 2002 demonstrated findings consistent with a healed or treated tear in the posterior horn of the lateral meniscus with a minimal truncation of the free edge of the posterior horn of the medial meniscus and prior debridement. A cyst due in part to a ganglion was also present.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

specified body members, functions or organs. The Act, however, does not specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice under the law for 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*[6] has been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.[7]

ANALYSIS

The Board finds that the case is not in posture for decision.

The schedule award granted in this case was based on the reports of Dr. Terry, appellant's attending orthopedic surgeon, who performed a diagnostic arthroscopy on June 5, 2002 and found partial tears of the lateral and medial menisci. Dr. Terry provided an impairment estimate of two percent of the left lower extremity. Dr. Collins, the Office medical adviser, noted that the accepted condition was a partial tear of the medial meniscus, for which the A.M.A., *Guides* provide a two percent impairment rating.

Under the fifth edition of the A.M.A. *Guides,* Table 17-33 provides the rating protocol for determining impairment estimates for certain lower extremity conditions. A partial meniscectomy of either the medial or lateral meniscus is rated as a two percent impairment of the lower extremity. The Board notes, however, that the surgical reports of Dr. Terry identified partial tears of both the medial and lateral menisci, for which surgical correction was made. In such cases, the A.M.A., *Guides* allow for a rating of 10 percent impairment of the lower extremity. While the record reveals that the Office accepted only a tear of the medial meniscus due to the March 21, 2002 injury, it is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments are to be included.[8] The Office's procedure manual requires that, in evaluating the loss of use of a schedule member due to an employment injury, the total amount of the permanent impairment of the scheduled member is to be determined, including any preexisting impairment.[9] For this reason, the Board will set aside the September 11, 2003 schedule award and remand the case to the Office for a determination of the total amount of impairment to appellant's left lower extremity.

On appeal, appellant contends that he has greater impairment than that awarded by the Office. The Board notes that the medical report of Dr. Gaw is of diminished probative value as to the extent of permanent impairment in this case because the physician did not properly rate appellant's impairment under the standards applied by the Office. Dr. Gaw rated impairment to appellant's back, combined the back impairment rating with the left knee findings, and stated his

[6] A.M.A., *Guides*, *supra* note 1.

[7] *See Joseph Lawrence, Jr., supra* note 1; *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989); *Francis John Kilcoyne*, 38 ECAB 168 (1986).

[8] *See Mike E. Reid*, 51 ECAB 543 (2000).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3(a)(3) (October 1990).

estimates of impairment in terms of whole person percentage loss. No schedule award is payable for permanent impairment, or loss of use, for anatomical members or functions or organs of the body which are not specified under the Act or in the implementing regulations.[10] As neither the Act nor the federal regulations provide for the payment of a schedule award for permanent loss of use of the back or to the body as a whole, appellant is not entitled to such an award. Although the A.M.A., *Guides* include protocols for estimating impairment of the spine, a schedule award is not payable under the Act for injury to the back.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the extent of permanent impairment to appellant's left lower extremity. The case will be remanded to the Office for further consideration of the claim consistent with this decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 11, 2003 be set aside and the case remanded to the Office for proceedings consistent with this decision.

Issued: January 28, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[10] *See* 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a). *See also Jay K. Tomokiyo*, 51 ECAB 361 (2000).