

FACTUAL HISTORY

This case was previously before the Board on appeal. In its February 6, 2002 decision, the Board affirmed the Office's April 4 and May 18, 2000 decisions denying appellant's request for modification of its November 23, 1999 decision, granting appellant a schedule award for a 15 percent permanent impairment of the left lower extremity. The Board also affirmed the Office's February 16, 2001 decision denying appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a). The facts of the case are accurately set forth in the Board's decision.¹

Subsequent to the Office's November 23, 1999 decision, granting appellant a schedule award for his left lower extremity, the Office received information from appellant and medical reports indicating that he was experiencing problems with his right knee. On June 15, 2000 the Office referred appellant to Dr. William Boeck, Jr., a Board-certified orthopedic surgeon, for a second opinion medical examination to determine whether he sustained a work-related right knee injury and whether surgery was necessary.

On June 19, 2002 appellant filed a schedule award for his right knee.

Dr. Boeck submitted an August 1, 2000 report, finding that appellant had chondromalacia of the right knee that was aggravated by prolonged periods of standing and walking, the use of stairs and similar activities. Consequently, on August 29, 2000 the Office expanded the acceptance of appellant's claim to include chondromalacia of the right knee.

On July 8, 2002 an Office medical adviser reviewed appellant's medical records including, a June 11, 2002 medical report of Dr. John Kayvanfar, an orthopedic surgeon and appellant's treating physician. The Office medical adviser stated that this report indicated a history of right knee surgery with a postoperative diagnosis of minimal lateral patella compression syndrome, chondral fracture of the medial femoral condyle and chondromalacia with appellant undergoing diagnostic arthroscopy, removal of a shelf, chondroplasty of the trochlear and medial femoral condyle. In addition, the Office medical adviser noted subjective complaints of constant slight pain which became moderate and intermittent with stair climbing, stooping, pushing, pulling and lifting. He also noted that pain levels were 4/10. The Office medical adviser graded the subjective complaints as a maximal Grade 3 based on the grading scheme in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*) 482, Table 16-10. The Office medical adviser determined that this would be pain and altered sensation that may interfere with activity or a 60 percent grade of a maximal 7 percent (femoral nerve), which was equivalent to a 4.2 or a 4 percent impairment rounded off for pain factors. He noted that the records did not document any loss of motion for a zero percent impairment. The Office medical adviser further noted that the records indicated 'minimal muscle atrophy' which would be rated at zero. Utilizing this method, he determined that appellant had a four percent impairment. He stated that the records indicated a positive patellofemoral test and evidence of chondromalacia patella and crepitation, which constituted a five percent impairment based on the footnote attached to Table 17-31. The Office medical adviser also stated that no other value would be combined with this rating. He

¹ Docket No. 01-1211 (issued February 6, 2002).

determined that the second method arrived at a higher award and that it should be adopted that appellant had a five percent impairment of the lower extremity or leg and that he reached maximum medical improvement by April 16, 2002.

By decision dated August 5, 2002, the Office granted appellant a schedule award for a five percent impairment of the right leg. Appellant requested reconsideration in a January 7, 2003 letter, accompanied by Dr. Kayvanfar's December 18, 2002 report. In this report, Dr. Kayvanfar provided a history of his treatment of appellant's right knee and appellant's inability to engage in certain physical activities. On physical examination, Dr. Kayvanfar found that there was no instability found in appellant's knee even though the knee made a grinding noise all the time according to appellant. He further found that appellant's knee stiffened after prolonged sitting and appellant was unable to walk more than 30 minutes. He stated that range of motion was from 0 to 120 degrees with minimal muscle atrophy. Muscle strength in the hamstring decreased compared to the quadriceps. Dr. Kayvanfar noted that appellant walked with a wide base gait and there was crepitation with range of motion of the knee and ambulation. He stated that, based on Table 18.3 of the A.M.A., *Guides*, appellant fell into the Class II category, which was considered to be a moderate pain disorder. According to Table 18.4, appellant was "D#5" consisting of impairment associated pain. Based on Table 18.5, the assessment of pain behavior was +5 and based on Table 18.7, appellant had a pain-related impairment score of 24. Dr. Kayvanfar opined that appellant's "disability factor would be around 24."

On February 2, 2003 the Office medical adviser again reviewed appellant's medical records including, Dr. Kayvanfar's December 18, 2002 report. He stated that his five percent impairment assessed for chondromalacia patella based on the footnote attached to Table 17-31 encompassed pain factors. He stated, however, that Dr. Kayvanfar made a case that appellant had a pain-related impairment that had increased the burden of his condition slightly. Based on this, the Office medical adviser stated that Chapter 18 of the A.M.A., *Guides* would allow one to increase the percentage by up to three percent. Given that the impairment score disability factor according to Table 18-7 was 24 and interpreted as mild, the Office medical adviser recommended an additional one percent impairment to arrive at an overall 6 percent impairment, which was 1 percent higher than the previously calculated award. He concluded that the date of maximum medical improvement remained the same.

In letters dated March 3 and 11, 2003, appellant again requested reconsideration of the Office's August 5, 2002 decision because it had been two months since he sent his first letter and he had not heard anything from the Office. Appellant resubmitted Dr. Kayvanfar's December 18, 2002 report along with his March 11, 2003 request.

On April 1, 2003 the Office granted appellant a schedule award for an additional one percent permanent loss of use of his right leg based on the Office medical adviser's opinion. By letter dated July 28, 2003, appellant requested reconsideration accompanied by Dr. Kayvanfar's July 3, 2003 report. In this report, Dr. Kayvanfar provided a history of appellant's right knee surgery, continued pain and physical limitations. On physical examination, he indicated that appellant's knee stiffened after prolonged sitting, he was unable to walk more than 30 minutes, range of motion was from 0 to 120 degrees with slight muscle atrophy, muscle strength in the hamstring decreased compared to the quadriceps and appellant walked with a wide base gait.

Dr. Kayvanfar also noted that there was crepitation with range of motion of the knee and ambulation and appellant was unable to use stairs independently and ladders. He stated that appellant was also unable to stoop, squat, bend, jump and walk long distances. He also stated that appellant's knee pops and grinds and constantly tingles and the pain level was 7/10. Dr. Kayvanfar opined:

“According to A.M.A., *Guide[s]*, Table 17.1, thigh atrophy. Table 17.10, moderate impairment. Table 17.5 gait disorder. Table 17.6, leg muscle impairment. Table 17.8, muscle weakness. Table 18.3, [appellant] is class II, considered moderate pain disorder. According to Table 18.4 it is D#5 consisting of impairment associated pain. Table 18.5 assessment of pain behavior is +5. Table 18.7 impairment score is a 24.

“His disability factor would be 24.”

The Office also received Dr. Kayvanfar's treatment notes dated July 30 and September 9, 2003, indicating that appellant suffered from right knee pain.

In a September 30, 2003 decision, the Office denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was repetitious and cumulative and thus insufficient to warrant a review of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of the Federal Employees' Compensation Act² and its implementing regulation³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.⁴ However, neither the Act nor the regulation specify the manner in which the percentage of impairment shall be determined. For consistent results and to insure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.⁵

ANALYSIS -- ISSUE 1

In this case, appellant submitted the December 18, 2002 report of his treating physician, Dr. Kayvanfar. In this report, Dr. Kayvanfar provided a history of his treatment of appellant's right knee, appellant's inability to engage in certain physical activities and his findings on

² 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

³ 20 C.F.R. § 10.404.

⁴ 5 U.S.C. § 8107(c)(19).

⁵ *Thomas D. Gunthier*, 34 ECAB 1060 (1983).

physical examination. He stated that, based on Table 18.3 of the A.M.A., *Guides*, appellant fell into the Class II category, which was considered to be a moderate pain disorder. According to Table 18.4, Dr. Kayvanfar stated that appellant was “D#5” consisting of impairment associated pain. Based on Table 18.5, he determined that the assessment of pain behavior was +5 and based on Table 18.7, appellant had a pain-related impairment score of 24. Dr. Kayvanfar opined that appellant’s disability factor would be around 24.

The Office medical adviser reviewed appellant’s medical records including, Dr. Kayvanfar’s December 18, 2002 report and stated that Dr. Kayvanfar made a case that appellant had a pain-related impairment that had increased the burden of appellant’s condition slightly. Given this, the Office medical adviser stated that Chapter 18 of the A.M.A., *Guides* allowed an increase of the percentage of impairment by up to three percent. He stated that given the pain-related impairment score of 24 was, according to Table 18.7, interpreted as “mild,” he recommended an additional 1 percent to arrive at an overall 6 percent impairment. He further stated that the date of maximum medical improvement remained the same, April 16, 2002.

The Board concludes that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant had no additional impairment of his right leg. Regarding Dr. Kayvanfar’s finding that appellant had an impairment rating score of 24 based on Table 18.7, the A.M.A., *Guides*, provides that “The impairment rating score is not an impairment rating.” The pain-related impairment score is used to classify the individual’s pain from mild to severe, not as a basis of a percentage of impairment of a scheduled member. Thus, Dr. Kayvanfar did not properly utilize the tables in the A.M.A., *Guides* in determining the extent of impairment of appellant’s right leg. Accordingly, appellant has failed to provide probative, supportable medical evidence that he has greater than a six percent permanent impairment of the right leg.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,⁶ the Office’s regulation provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.⁷ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for reconsideration within one year of the date of that decision.⁸ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.

⁶ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.” 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(1)-(2).

⁸ *Id.* at § 10.607(a).

ANALYSIS -- ISSUE 2

In support of his request for reconsideration, appellant submitted Dr. Kayvanfar's treatment notes dated July 30 and September 9, 2003, indicating that he suffered from right knee pain. These treatment notes are not relevant as they failed to address whether appellant had a greater impairment of his right leg than that, for which he received a schedule award.

Appellant also submitted Dr. Kayvanfar's July 3, 2003 medical report revealing the history of his treatment of appellant's right knee and appellant's inability to engage in certain physical activities and his findings on physical examination. He stated:

"According to A.M.A., *Guide[s]*, Table 17.1, thigh atrophy. Table 17.10, moderate impairment. Table 17.5 gait disorder. Table 17.6, leg muscle impairment. Table 17.8, muscle weakness. Table 18.3, [appellant] is class II, considered moderate pain disorder. According to Table 18.4 it is D#5 consisting of impairment associated pain. Table 18.5 assessment of pain behavior is +5. Table 18.7 impairment score is a 24.

"His disability factor would be 24."

Although Dr. Kayvanfar's July 3, 2003 report is similar to his previous reports, he utilized a different table, Table 17 instead of Table 18 of the A.M.A., *Guides*, in determining an impairment rating for appellant's right leg. Thus, the Board finds that appellant has submitted relevant and pertinent new evidence not previously reviewed by the Office. On remand, the Office should conduct a merit review of appellant's claim and issue an appropriate decision.

CONCLUSION

The Board finds that appellant has failed to establish that he has greater than a six percent permanent impairment of the right leg, for which he received a schedule award. The Board, however, finds that the Office improperly denied appellant's request for a merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2003 decision of the Office of Workers' Compensation Programs regarding the denial of appellant's request for a merit review of his claim is set aside and the case is remanded for further consideration consistent with this decision. The Office's April 1, 2003 decision regarding the finding that appellant is not entitled to an additional schedule award is affirmed.

Issued: May 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
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