

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**HECTOR J. AGUILERA, Appellant**

**and**

**DEPARTMENT OF THE ARMY, U.S. ARMY  
AIR DEFENSE CENTER, Fort Bliss, TX,  
Employer**

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**Docket No. 05-322  
Issued: June 21, 2005**

*Appearances:*  
*Hector J. Aguilera, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On November 18, 2004 appellant filed a timely appeal of a May 17, 2004 decision, in which an Office of Workers' Compensation Programs' hearing representative affirmed a schedule award for a 15 percent impairment of the right lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award issue in this case.

**ISSUE**

The issue is whether appellant has more than a 35 percent impairment of the right lower extremity, for which he received a schedule award.

**FACTUAL HISTORY**

This case was previously before the Board.<sup>1</sup> On October 14, 1993 appellant, then a 48-year-old motor vehicle operator, filed a claim alleging that he sustained an injury to his right

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<sup>1</sup> In an decision remanding the case dated September 24, 2004, the Board set aside the Office's overpayment decision dated June 9, 2004 and remanded the case for further development. Specifically, the Board found that appellant's appeal, docketed as No. 04-1926, was not in posture for decision as the case record was incomplete. *See*

knee and leg while in the performance of duty. The Office accepted his claim for a right knee strain and a right ankle strain and authorized three knee surgeries, with the last surgery performed in November 2001.<sup>2</sup> The Office subsequently accepted the conditions of degenerative joint disease and right knee chondromalacia Grade 2 to the patella medial femoral condyle and lateral tibia plateau. Appellant was compensated for appropriate periods of wage loss and returned to regular, unrestricted duty in March 2002. The record also reflects that the Office accepted an August 31, 1999 claim for a lumbar strain and cervical strain, for which he received appropriate compensation.<sup>3</sup> Appellant retired on July 31, 2002.

With respect to his right knee condition, appellant received several schedule awards. In a December 19, 1994 report, Dr. Eduardo Hazarian, a Board-certified orthopedic surgeon, advised that appellant reached maximum medical improvement on April 27, 1994. Utilizing Table 41 of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Hazarian opined that since appellant had a mild loss of range of motion of the knee joint, he had a four percent impairment of the whole person. An Office medical adviser, in a report dated February 22, 1995, noted that as Dr. Hazarian indicated that appellant had significant chondromalacia, Table 64, page 85 of the A.M.A., *Guides* would entitle him to a 10 percent impairment of the right lower extremity, which was equivalent to Dr. Hazarian's 4 percent whole person impairment. The Office medical adviser further found that, although he stated that appellant had 120 degrees of flexion, this did not merit an impairment rating under the A.M.A., *Guides*.<sup>4</sup>

By decision dated March 9, 1995, the Office granted appellant a 10 percent schedule award for his right lower extremity for 28.80 weeks, for the period May 4 to November 21, 1994.

In support of an increase in his award, appellant submitted a November 16, 1996 report from Dr. Hazarian. Utilizing Table 62, page 83 of the fourth edition of the A.M.A., *Guides*, he opined that appellant had a 15 percent impairment to his right lower extremity based on an x-ray which showed a one millimeter interval at the patellofemoral joint. On March 27, 1997 an Office medical adviser reviewed the medical evidence of record and agreed with Dr. Hazarian's opinion that appellant had 15 percent impairment to his right lower extremity due to arthritis.

By decision dated April 17, 1997, the Office awarded appellant a 15 percent permanent impairment to his right lower extremity for 43.20 weeks for the period October 13, 1996 to April 16, 1997. Because his schedule award overlapped with a period of compensation to which

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Docket No. 04-1926 (issued September 24, 2004). The Office subsequently issued a November 10, 2004 preliminary notice of overpayment; however, the record does not indicate that the Office issued a final decision regarding this matter. The Board's jurisdiction is limited to consider and decide appeals from final decisions of the Office issued within one year prior to the filing of the appeal. 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *William N. Downer*, 52 ECAB 217 (2001). The Board does not have jurisdiction over the overpayment issue in this case.

<sup>2</sup> The Office adjudicated this claim under File No. 160231878.

<sup>3</sup> File No. 16-0340175.

<sup>4</sup> A.M.A., *Guides*, Table 41, page 78 (4<sup>th</sup> ed. 1993).

appellant was not entitled, he received a total of \$9,868.58 or 26.5 weeks of additional compensation for the period October 13, 1996 to April 16, 1997.

On March 20, 2002 appellant filed a CA-7 claim for an increased schedule award. In an April 24, 2002 report, Dr. Terren Klein, a Board-certified orthopedic surgeon, advised that he was status post-surgery to the right knee on November 7, 2001 and that maximum medical improvement was reached March 21, 2002. Under the fifth edition of the A.M.A., *Guides*, Dr. Klein opined that appellant had a 10 percent impairment of the lower extremity based on Table 17-33, page 546 on account of the partial medial and lateral meniscectomy. On May 17, 2002 an Office medical adviser reviewed Dr. Klein's report and agreed that appellant had a 10 percent right lower extremity impairment based on Table 17-33, page 546 of the A.M.A., *Guides*.

By decision dated May 23, 2002, the Office awarded appellant a 10 percent impairment to the right lower extremity for 28.80 weeks for the period April 24 to May 18, 2002.

In a February 20, 2003 report, Dr. Joseph Neustein, a Board-certified orthopedic surgeon, performed an impairment rating of appellant's lower extremities. He opined that under the fifth edition of the A.M.A., *Guides*, appellant had a three percent right lower extremity rating for sensory dysesthesia. Under Table 15-15 page 424, he found that appellant had a 25 percent sensory deficit and, under Table 15-18, he had a 2.5 percent impairment for the L5 root. Dr. Neustein further addressed appellant's left leg impairment, asserting that he had 13 percent left lower extremity impairment plus 3 percent for the right leg for a total of 16 percent for the lower extremities.

Appellant filed a schedule award claim, claiming additional impairment to both the left and right lower extremities. By decision dated August 15, 2003, the Office denied the claim for a right lower extremity schedule award on the basis that the evidence was insufficient to support a greater impairment than the 35 percent previously awarded. The Office also explained that it was deferring further consideration of a claim for impairment to the left lower extremity under the 1999 injury claim as a potential overpayment existed amounting to 20 percent of the right lower extremity as provided under the 1997 and 2002 schedule award letters.

On August 25, 2003 the Office doubled appellant's claims into one file.

On August 25, 2003 appellant requested a hearing on the August 15, 2003 decision, which was held on February 23, 2004. A copy of Dr. Neustein's February 20, 2003 report was submitted along with a March 5, 2003 report, which only addressed his upper extremities.

By decision dated May 17, 2004, an Office hearing representative affirmed the August 15, 2003 decision. The Office hearing representative determined that appellant had not submitted sufficient medical evidence to establish a greater impairment to his right lower extremity than the 35 percent previously awarded. With respect to the schedule award claim for the left lower extremity, the Office hearing representative found that appellant was possibly entitled to payment of compensation for a schedule award and the fact that an overpayment

might exist did not diminish the Office's responsibility to further develop the claim or pay benefits to which he may be entitled.<sup>5</sup>

### **LEGAL PRECEDENT**

Under section 8107 of the Federal Employees' Compensation Act<sup>6</sup> and section 10.404 of the implementing federal regulations,<sup>7</sup> schedule awards are payable for permanent impairment of 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*<sup>8</sup> has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating schedule losses.<sup>9</sup> As of February 1, 2001, all new schedule awards are based on the fifth edition of the A.M.A., *Guides*. Also, as of February 1, 2001, any recalculation of a previous schedule award pursuant to an appeal, request for reconsideration or decision of an Office hearing representative, is based on the fifth edition of the A.M.A., *Guides* regardless of the date of the medical examination.<sup>10</sup>

### **ANALYSIS**

The Office issued three schedule awards to appellant for the right lower extremity, which comprised of a 10 percent award on March 9, 1995, a 15 percent award on April 17, 1997 and a 10 percent award on May 23, 2002 or total compensation for 35 percent impairment. The Office subsequently determined that appellant was not entitled to an additional schedule award, which its hearing representative affirmed on May 17, 2004.

A review of the schedule awards of record reveals that appellant has no more than a 24 percent impairment of the right lower extremity. In each schedule award issued, the record reflects that the Office medical adviser applied the appropriate edition of the A.M.A., *Guides* to

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<sup>5</sup> The Office did not issue a final decision regarding schedule award entitlement for the left leg. Therefore, as the hearing representative's decision was interlocutory and the Board is without jurisdiction to consider any impairment of the left leg. See 20 C.F.R. § 501.2(c).

<sup>6</sup> 5 U.S.C. § 8107.

<sup>7</sup> 20 C.F.R. § 10.404.

<sup>8</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

<sup>9</sup> See *Joseph Lawrence*, 53 ECAB 331 (2002); *James J. Hjort*, 45 ECAB 595 (1994); *Leisa D. Vassar*, 40 ECAB 1287 (1989).

<sup>10</sup> *Id.* See FECA Bulletin 01-05 (issued January 29, 2001) (awards calculated according to any previous edition should be evaluated according to the edition originally used; any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001). See also FECA Tr. No. 02-12 (issued August 30, 2002) (all permanent impairment awards determined on or after February 1, 2001, should be based on the fifth edition of the A.M.A., *Guides*, first published in 2001). See also *Stanley B. Klitenic* (Docket No. 02-216, issued June 5, 2002) (citing FECA Bulletin 01-05 in holding that as of February 1, 2001, any recalculation of a previous schedule award is based on the fifth edition of the A.M.A., *Guides*).

the findings of appellant's physicians in determining his impairment rating. On February 22, 1995 the Office medical adviser reviewed Dr. Hazarian's December 19, 1994 report and found that, although 120 degrees of flexion did not amount to an impairment rating under the A.M.A., *Guides*,<sup>11</sup> appellant had a 10 percent impairment for the partial meniscectomy.<sup>12</sup> The Office granted a schedule award issued on March 9, 1995 for 10 percent impairment.

On March 27, 1997 an Office medical adviser properly applied the Table 62, page 83 of the fourth edition of the A.M.A., *Guides* to Dr. Hazarian's x-ray finding of a 1 millimeter interval at the patellofemoral joint to find that appellant had 15 percent impairment. The Office, on April 17, 1997, awarded an additional 15 percent schedule award, for a total of 25 percent. The Board notes that, although appellant's original award was calculated under the fourth edition of the A.M.A., *Guides*, the fifth edition of the A.M.A., *Guides* is applicable as a recalculation of the award resulted from the Office hearing representative's May 17, 2004 decision.<sup>13</sup> Pursuant to Table 17.2, page 526 of the A.M.A., *Guides*, impairment ratings for meniscectomy and arthritis are to be combined. Thus, the Office should have combined appellant's previous award for a 10 percent impairment for the partial meniscectomy to the additional 15 percent schedule award for arthritis, for a total award of 24 percent impairment under the Combined Values Chart, page 604.

On May 17, 2002 an Office medical adviser applied Dr. Klein's findings to Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides* and determined that appellant had 10 percent impairment based on a partial medial and lateral meniscectomy. As this impairment rating is equivalent to the 10 percent impairment rating found under the March 9, 1995 schedule award for meniscectomy, appellant was not entitled to additional compensation. However, the Office's May 23, 2002 schedule award granted an additional 10 percent schedule award for a total of 35 percent impairment.

At the time appellant submitted Dr. Neustein's February 20 and March 5, 2003 reports, the medical evidence supported a maximum of 24 percent impairment to the right lower extremity. On February 20, 2003 Dr. Neustein opined that under the fifth edition of the A.M.A., *Guides*, appellant had a three percent right lower extremity rating for sensory dysesthesia. Although Dr. Neustein did not provide any explanation as to how he arrived at his three percent rating, the Board notes this evidence is insufficient to show greater impairment than that already awarded by the Office. Accordingly, appellant has not established that he has greater than 35 percent impairment for which he has received a schedule award.

### **CONCLUSION**

The evidence establishes that appellant has no more than 35 percent impairment to his right lower extremity, for which he already received schedule awards.

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<sup>11</sup> A.M.A., *Guides*, Table 41, page 78 (4<sup>th</sup> ed. 1993).

<sup>12</sup> *Id.* at Table 64, page 85 (4<sup>th</sup> ed. 1993).

<sup>13</sup> *See supra* note 10.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 17, 2004 is affirmed as modified.

Issued: June 21, 2005  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member