

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

_____)	
ROY J. YEGGY, Appellant)	
)	
and)	Docket No. 06-43
)	Issued: February 6, 2006
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Iowa City, IA, Employer)	
_____)	

Appearances:
Roy J. Yeggy, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 4, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 26, 2004 merit decision concerning his entitlement to schedule award compensation and a June 27, 2005 decision denying his request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a three percent permanent impairment of his left leg; and (2) whether the Office properly denied his request for a review of the written record.

FACTUAL HISTORY

On February 11, 1998 appellant, then a 55-year-old housekeeping aid, filed a traumatic injury claim alleging that he sustained an injury at work on February 9, 1998 when he fell on

stairs at work, landed on his left leg and twisted his left knee.¹ The Office accepted that appellant sustained a medial meniscus tear of his left knee. On February 9, 2001 he underwent a partial medial meniscectomy of his left knee with abrasion arthroplasty of the medial tibial plateau, which was authorized by the Office.² He returned to light-duty work for the employing establishment in March 2001.

Appellant filed a claim alleging that he was entitled to a schedule award due to his February 9, 1998 employment injury.

In a report dated May 28, 2002, Dr. James M. Pape, an attending Board-certified orthopedic surgeon, detailed appellant's left knee surgery and indicated that he continued to report knee pain and tenderness in the area of his left distal iliotibial band. Dr. Pape stated that appellant had reached maximum medical improvement and noted:

“Using Table 17-33 on page 546 and Table 17-31 on page 544 [of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001)] I would suggest that the patient has a [seven] percent impairment to his [left]³ lower extremity, which would translate into a [three] percent whole person impairment. I think that this impairment rating well takes into account the patient's injury as well as his surgical findings from his left knee arthroscopy of February, 2001.”

On February 26, 2004 the Office referred appellant to Dr. Robert J. Chesser, a physician Board-certified in physical medicine and rehabilitation, for further evaluation of the permanent impairment of his left leg. In a report dated April 21, 2004, Dr. Chesser reported the findings of his examination and noted that appellant exhibited mild tenderness in the lateral aspect of his left knee and had normal sensation and strength in his left leg.⁴ He stated that appellant exhibited left knee flexion of 150 degrees and therefore would not be entitled to a range of motion impairment rating under the fifth edition of the A.M.A., *Guides*. Dr. Chesser noted that appellant had a 1 centimeter atrophy at the measurement point 10 centimeters above the left patella, which would entitle him to a 3 percent impairment rating under Table 17-6 on page 530 of the A.M.A., *Guides*. He noted that, in the alternative, appellant's February 2001 partial medial meniscectomy of the left knee would entitle him to a two percent impairment rating under Table 17-33 on page 546 of the A.M.A., *Guides*.⁵ Dr. Chesser determined that the three

¹ This claim was assigned the file number 11-0163106. Appellant filed an occupational disease claim in January 2000, which was accepted for bilateral tendinitis of the hands/wrists. The claim was assigned the file number 11-0178235 and the two claim files have been combined under the master file number 11-0163106. Appellant's upper extremity injury is not the subject of the present appeal.

² Appellant underwent a left medial meniscectomy in July 1980.

³ Dr. Pape inadvertently wrote “right” rather than “left.” The remainder of his report correctly refers to the left knee.

⁴ Dr. Chesser indicated that appellant had reached maximum medical improvement in March 2001.

⁵ He indicated that Table 17-6 provided for a 3 to 8 percent rating for atrophies ranging from 1 to 1.9 centimeters and therefore it was appropriate to assign the 3 percent value in appellant's case.

percent and the two percent impairment values could not be combined and therefore chose the higher value to represent the impairment to appellant's left leg.

In a report dated May 17, 2004, an Office district medical director indicated that he agreed with Dr. Chesser that appellant had a three percent permanent impairment of his left leg.

By decision dated May 25, 2004, the Office granted appellant a schedule award for a three percent permanent impairment of his left leg.

On June 21, 2004 appellant requested a review of the written record by an Office hearing representative and argued that he had greater than a three percent impairment to his knee.

By decision dated and finalized October 26, 2004, the Office hearing representative affirmed the May 25, 2004 decision.

On June 3, 2005 appellant requested another review of the written record before an Office hearing representative.⁶

By decision dated June 27, 2005, the Office denied appellant's request for a review of the written record, noting that he had already received a review of the written record and was not entitled to another as a matter of right. The Office further noted that it had exercised its discretion and determined that appellant's request was denied for the further reason that the issue in the present case could equally well be addressed by submitting new and relevant evidence and requesting reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act⁷ and its implementing regulation⁸ sets 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 to 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* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.⁹

⁶ It appears that appellant effectuated this request by resubmitting his June 2004 request for a review of the written record.

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404 (1999).

⁹ *Id.*

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a medial meniscus tear of his left knee and on February 9, 2001 he underwent a partial medial meniscectomy of his left knee with abrasion arthroplasty of the medial tibial plateau, which was authorized by the Office. The Office granted appellant a schedule award for a three percent permanent impairment of his left leg.

The Board finds that the Office properly based its award on the opinion of Dr. Chesser, a physician Board-certified in physical medicine and rehabilitation, who served as an Office referral physician. In a report dated April 21, 2004, Dr. Chesser correctly found that appellant's left knee flexion of 150 degrees would not entitle him to a range of motion impairment rating under the fifth edition of the A.M.A., *Guides*.¹⁰ Dr. Chesser noted that appellant's 1 centimeter atrophy at the measurement point 10 centimeters above the left patella would entitle him to a 3 percent impairment rating under the A.M.A., *Guides*.¹¹ In the alternative, appellant's February 2001 partial medial meniscectomy of the left knee would entitle him to a two percent impairment rating.¹² Dr. Chesser properly determined that these impairment values could not be combined under the A.M.A., *Guides*¹³ and chose the higher value of three percent to represent the impairment of appellant's left leg.

In a report dated May 28, 2002 report, Dr. Pape, an attending Board-certified orthopedic surgeon, concluded that appellant had a seven percent impairment of his left leg. He indicated, "Using Table 17-33 on page 546 and Table 17-31 on page 544 [of the A.M.A., *Guides* (5th ed. 2001)], I would suggest that the patient has a [seven] percent impairment to his [left] lower extremity, which would translate into a [three] percent whole person impairment." This report is of limited probative value in that Dr. Pape failed to provide an explanation of how his rating of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹⁴ Although using Table 17-33 could justify a two percent impairment, as described above, Dr. Pape did not provide any explanation of how application of Table 17-31 would raise appellant's impairment to 7 percent. Table 17-31 involves the analysis of impairment due to arthritis by examining specific types of x-ray testing which measure cartilage intervals of the knee. However, the record does not contain any x-ray testing of appellant's left knee, let alone testing that was performed in accordance with the standards of Table 17-31.¹⁵

¹⁰ See A.M.A., *Guides* 537, Table 17-10.

¹¹ See *id.* at 530, Table 17-6.

¹² See *id.* at 546, Table 17-33.

¹³ See *id.* at 526, Table 17-2. He also properly determined that the limited findings on examination showed that an evaluation of appellant's impairment under the sections of the A.M.A., *Guides* for sensory or strength loss would not yield a higher impairment rating. See A.M.A., *Guides* 482-84, 523-26.

¹⁴ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

¹⁵ See A.M.A., *Guides* 530, Table 17-6.

LEGAL PRECEDENT -- ISSUE 2

Section 8124 of the Act provides that a claimant is entitled to a hearing before an Office representative when a request is made within 30 days after issuance of an Office final decision. The Office's regulations have expanded section 8124 to provide the opportunity for a "review of the written record" before an Office hearing representative in lieu of an "oral hearing." The Office has provided that such review of the written record is also subject to the same requirement that the request be made within 30 days of the Office's final decision.¹⁶ In addition, a claimant is not entitled to a hearing as a matter of right when he has already had a hearing on the same issue.¹⁷

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision has been made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.¹⁸ The principles underlying the Office's authority to grant or deny a written review of the record are analogous to the principles underlying its authority to grant or deny a hearing. The Office's procedures, which require the Office to exercise its discretion to grant or deny a request for a review of the written record when such a request is untimely or made after reconsideration, an oral hearing or a review of written record are a proper interpretation of the Act and Board precedent.¹⁹ The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.²⁰

ANALYSIS -- ISSUE 2

Appellant's June 3, 2005 request for a review of the written record was made after he had previously had a review of the written record on the same matter and, thus, he was not entitled to a review of the written record as a matter of right. Hence, the Office was correct in finding in its June 27, 2005 decision that appellant was not entitled to a review of the written record as a matter of right.²¹ Moreover, the Office properly exercised its discretion by determining that appellant's request was denied for the further reason that the issue in the present case could equally well be addressed by submitting new and relevant evidence and requesting reconsideration. The evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record, which could be found to be an abuse of discretion.

¹⁶ 20 C.F.R. § 10.616(a); see *Michael J. Welsh*, 40 ECAB 994, 996 (1989).

¹⁷ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

¹⁸ *Henry Moreno*, 39 ECAB 475, 482 (1988).

¹⁹ See *Michael J. Welsh*, *supra* note 16 at 996-97.

²⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

²¹ See *supra* notes 18 and 19 and accompanying text. In addition, appellant's request was not made within the requisite 30-day period after the October 26, 2004 decision.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a three percent permanent impairment of his left leg. The Board further finds that the Office properly denied his request for a review of the written record.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' June 27, 2005 and October 26, 2004 decisions are affirmed.

Issued: February 6, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board