

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

R.W., Appellant

and

**DEPARTMENT OF THE ARMY, MILITARY
OCEAN TERMINAL, Bayonne, NJ, Employer**

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**Docket No. 07-692
Issued: August 16, 2007**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 12, 2007 appellant filed a timely appeal from the July 21, 2006 merit decision of the Office of Workers' Compensation Programs' hearing representative, who affirmed a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the schedule award.

ISSUE

The issue is whether appellant has more than a 35 percent permanent impairment of his left lower extremity.

FACTUAL HISTORY

On October 26, 1995 appellant, then a 38-year-old lead firefighter sustained an injury in the performance of duty: "Injured knee when stepping into loading ramp while conducting firefighting operations." The Office accepted his claim for torn left lateral meniscus and authorized an April 10, 1996 arthroscopy for a medial and lateral partial menisectomy. Appellant had a previous total hip replacement.

On May 8, 1996 appellant sustained a second injury in the performance of duty: “Subject was climbing stairs to stow his personal gear in his living space on 2nd floor. He was on crutches at the time for a previous injury (light-duty status). As [appellant] neared the top of the first level of stairs he lost balance, dropped left foot and ankle.” The Office accepted this claim for Achilles tendinitis.

Appellant filed a claim for a schedule award. He submitted an April 3, 2000 evaluation from Dr. David Weiss, an osteopath, who related appellant’s history and complaints. Dr. Weiss described his findings on physical examination. He reported that appellant had a 45 percent impairment of his left lower extremity: 5 percent due to loss of external hip rotation and 10 percent due to loss of internal hip rotation, for a total of 15 percent; 10 percent due to partial medial and lateral meniscectomies; 5 percent due to medial condylar fracture;¹ 13 percent due to thigh atrophy; and 13 percent due to calf atrophy.

On November 25, 2003 an Office medical adviser reviewed Dr. Weiss’ findings. He agreed with Dr. Weiss’ impairment figures for the meniscectomies, condylar fracture and thigh atrophy. For the calf atrophy the Office medical adviser determined that appellant had an 11 percent impairment. He concluded that appellant had a 35 percent total impairment of the left lower extremity. The Office medical adviser offered no rating for loss of hip motion.

On January 15, 2004 the Office issued a schedule award for a 35 percent total impairment of the left lower extremity. On January 19, 2005 an Office hearing representative remanded the case for clarification of the medical adviser’s rating for calf atrophy. Following the medical adviser’s report that appellant had a three percent impairment of the left lower extremity due to calf atrophy measuring one centimeter, the Office issued a decision on June 9, 2005 finding that appellant was entitled to no greater schedule award.

In a decision dated July 21, 2006, an Office hearing representative affirmed the June 9, 2005 denial of a larger schedule award. The hearing representative found that appellant had a 35 percent impairment of his left lower extremity due to meniscectomies, condylar fracture and atrophy of the thigh and calf. He further found that appellant was entitled to no greater schedule award due to his preexisting hip replacement. The hearing representative stated:

“In addition, I find that any impairment involving the left hip range of motion attributed to the claimant’s prior hip surgery in 1988 is unrelated to the work-related injuries of October 26, 1995 and May 8, 1996 and does not involve the affected left knee joint. The evidence does not indicate that the claimant had any preexisting impairment involving the left knee and therefore impairment resulting from a hip condition is not considered related to the work injury. As such, any impairment resulting from the claimant’s left hip is not considered in the present schedule award claim.”

¹ The Office did not formally accept appellant’s claim for a medial condylar fracture.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act² authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.³

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 of the body are to be included. As noted by Larson, this is "sometimes expressed by saying that the employer takes the employee as he finds him."⁴ The percentage should include those conditions accepted by the Office as job related and any preexisting permanent impairment of the same member or function.⁵

ANALYSIS

By refusing to include the preexisting impairment due to loss of hip motion, the Office erroneously apportioned the impairment of appellant's left lower extremity. It is a settled matter of law that schedule awards are to include preexisting impairments of the same member. The Board finds, therefore, that the Office hearing representative erred in not considering the contribution of the preexisting impairment of the left hip to the total impairment of the left lower extremity. Moreover, Table 17-2, page 526, of the A.M.A., *Guides* presents a Cross-Usage Chart indicating which methods of evaluation and resulting impairments may be combined. The chart shows that impairment ratings for range of motion, atrophy and diagnosis-based estimates may not be combined. They are, in fact, mutually exclusive. Appellant may not receive a schedule award based on any combination of loss of hip motion, thigh and calf atrophy, or diagnosed knee conditions. It is the responsibility of the evaluating physician to explain in writing which method should be chosen as best representing the impairment of an injured claimant.⁶

The Board will set aside the hearing representative's July 21, 2006 decision, which found that appellant was entitled to a schedule award based on both diagnosis-based estimates and atrophy. The Board will remand the case for further development and an appropriate final

² 5 U.S.C. § 8107.

³ 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

⁴ *Raymond E. Gwynn*, 35 ECAB 247, 253 (1983) and cases cited therein at n.2 (holding that the Office improperly calculated the amount of the claimant's schedule award in that it failed to incorporate the preexisting impairment of the left knee).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.0700.3.a(3) (October 1990).

⁶ A.M.A., *Guides* 526. Should the evaluating physician determine that thigh and calf atrophy gives the most clinically accurate impairment rating, he should provide rationale for selecting a percentage from any of the ranges given in Table 17-6, page 530, of the A.M.A., *Guides*.

decision on appellant's entitlement to a schedule award for the permanent impairment of his left lower extremity.

CONCLUSION

The Board finds that this case is not in posture for decision as further development is warranted.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision.

Issued: August 16, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board