United States Department of Labor
Employees' Compensation Appeals Board

C.F., Appellant	)	
and	)	**Docket No. 06-1662**
	)	**Issued: May 31, 2007**
DEPARTMENT OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, Newark, NJ, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 July 17, 2006 appellant filed a timely appeal from the March 27 and June 30, 2006 merit decisions of the Office of Workers' Compensation Programs, which denied a schedule award for additional medical conditions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of that determination.[1]

ISSUE

The issue is whether appellant is entitled to a schedule award for additional medical conditions.

FACTUAL HISTORY

On May 13, 1969 appellant, then a 35-year-old investigator, sustained an injury in the performance of duty when he was involved in a motor vehicle collision. The Office accepted his

[1] Appellant does not appeal the Office's June 26, 2006 decision denying pool therapy in a particular setting.

claim for left knee contusion, cervical strain, lumbosacral sprain, left ankle sprain, left shoulder contusion and left chondromalacia patella.

On July 31, 1969 appellant sustained an injury in the performance of duty from another motor vehicle collision. The Office accepted this claim for cervical sprain, left ankle sprain, left knee contusion, left patellofemoral chondritis, contusion and sprain of the left ankle with peroneal-retinacular tear and ganglion, left shoulder contusion and bilateral chondromalacia patella.

On August 19, 1977 appellant sustained a third injury in the performance of duty while carrying a boarding bag. The Office accepted this claim for right shoulder strain. The record indicates that appellant had subsequent nonemployment injuries, including a motor vehicle accident on May 6, 1980.

On September 14, 2004 the Office issued a schedule award for a 20 percent permanent impairment of appellant's left lower extremity based on 5 to 90 degrees of knee flexion. An Office hearing representative affirmed this award on September 9, 2005.

Appellant submitted a September 26, 2005 report from Dr. Marc W. Urquhart, an orthopedic surgeon, who reviewed the Office's statement of accepted facts and noted the following accepted conditions: left knee contusion, cervical sprain, lumbosacral sprain; cervical sprain, left ankle sprain, left knee contusion; left knee patellofemoral chondritis, contusion, sprain of the left ankle with peroneal-retinacular tear and ganglion and left shoulder contusion. After describing his findings on examination, Dr. Urquhart determined that appellant had impairment of the upper extremities due to C5 and C6 sensory and motor deficits as well as bilateral shoulder impingement. He determined that appellant had impairment of the lower extremities due to L4 and L5 sensory losses. Dr. Urquhart also determined that appellant had a 10 percent impairment of each lower extremity due to loss of knee motion and 7 percent impairment due to loss of ankle motion.

Appellant asked the Office to include in his schedule award the additional conditions described and rated by Dr. Urquhart. On March 16, 2006 he filed a formal claim for a schedule award.

In a decision dated March 27, 2006, the Office denied appellant's claim for an additional schedule award. The Office explained that Dr. Urquhart provided impairment ratings for conditions that were not accepted as work related.

On April 5, 2006 appellant requested reconsideration. He submitted an August 2, 2005 communication from the Office's Branch of Hearings and Review listing all the medical conditions accepted in his several employment injuries and argued that the Office committed error in denying that these conditions were accepted.

On June 30, 2006 the Office reviewed the merits of appellant's claim and denied modification of its March 27, 2006 decision. The Office found no rationalized explanation of causal relationship for the conditions Dr. Urquhart rated.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[2] Section 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[3] 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*.[4]

A claimant seeking compensation under the Act has the burden to establish the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[5] A claimant seeking a schedule award under section 8107, therefore, has the burden to establish that he sustained a permanent impairment of a scheduled member or function as a result of an injury sustained while in the performance of duty.[6]

ANALYSIS

Dr. Urquhart provided impairment ratings on medical conditions that are not accepted as work related. He noted sensory and motor deficits of the C5 and C6 spinal nerve roots but did not show how these deficits were related to appellant's several employment injuries. Dr. Urquhart noted shoulder impingements and sensory deficits of the L4 and L5 spinal nerve roots but, again, made no attempt to explain how sprains or contusions in 1969 and 1977 caused permanent impairment. He reviewed the Office's statement of accepted facts and listed the various medical conditions that the Office has accepted. Appellant submitted an August 2, 2005 communication from the Office's Branch of Hearings and Review listing all the medical conditions accepted in his several employment injuries. Those accepted conditions clearly do not include shoulder or nerve root impingements. Appellant may well have impairment of his upper and lower extremities due to these impingements, but before he may receive a schedule award for any resulting impairment, he must discharge his burden to show that the impingements are causally related to one of his accepted employment injuries.[7] Dr. Urquhart does not purport

[2] 5 U.S.C. § 8102(a).

[3] *Id.* at § 8107(a).

[4] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[5] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[6] *See, e.g., Ernest P. Govednik*, 27 ECAB 77 (1975) (no medical evidence that the employment injury caused the claimant to have a permanent loss of use of a leg or any other member of the body specified in the schedule).

[7] Appellant would also be entitled to a schedule award for such impairment if he established that the impairment preexisted his injuries in 1969 and 1977. *E.g., Mike E. Reid*, 51 ECAB 543 (2000) (the additional 10 percent impairment of visual function caused by the employment injury was to be combined with the preexisting 80 percent impairment of visual acuity to determine the total percentage of loss of function of the eye).

to make that connection. Further, he does not attribute the left ankle impairment to appellant's accepted left ankle conditions and he does not explain why appellant has the same impairment in his uninvolved right ankle.

The Office, however, accepted bilateral chondromalacia patella and issued a schedule award based on left knee flexion of 5 to 90 degrees. Dr. Urquhart reported left knee flexion of 5 to 90 degrees, but he added that appellant had 5 to 100 degrees of flexion on the right, for which he rated 10 percent impairment. The Board finds that this evidence raises the question of whether appellant is entitled to a schedule award for loss of motion in his right knee resulting from the accepted chondromalacia patella. The Board will set aside this aspect of the Office's March 27 and June 30, 2006 decisions and remand the case for further development and an appropriate final decision on this issue.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he is entitled to a schedule award for medical conditions not shown to be causally related to his accepted employment injuries. For the accepted condition of chondromalacia patella on the right, however, further development is warranted.

ORDER

IT IS HEREBY ORDERED THAT the June 30 and March 27, 2006 decisions of the Office of Workers' Compensation Programs are affirmed, in part and set aside, in part on the issue of right knee impairment. The case is remanded for further development consistent with this opinion.

Issued: May 31, 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