United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
	)	**Docket No. 07-963**
and	)	**Issued: September 14, 2007**
	)	
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Greensboro, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 26, 2007 appellant filed a timely appeal of a December 5, 2006 merit decision of the Office of Workers' Compensation Programs which found that he had no more than a 50 percent permanent impairment of the right leg for which he received a schedule award. He also appealed a January 10, 2007 decision which denied his request for a lump-sum payment of the schedule award and a February 2, 2007 decision which denied further merit review of his claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues on appeal are: (1) whether the Office properly determined that appellant had no more than a 50 percent permanent impairment of his right leg for which he received a schedule award; (2) whether the Office properly denied appellant's request for a lump-sum payment for his schedule award; and (3) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On June 11, 2003 appellant, then a 39-year-old maintenance worker, filed a claim alleging that on June 5, 2003 he injured his right knee while attempting to mount a lawn mower. The Office accepted his claim for right knee contusion, right knee meniscus tear, derangement of the medial meniscus of the right knee and permanent aggravation of the right knee osteoarthritis. The Office authorized arthroscopic surgeries which were performed on August 11, 2003 and February 6, 2004 and a right total knee replacement which was performed on August 24, 2005. Appellant stopped work on June 6, 2003 and returned to a light-duty position on August 29, 2003. He was terminated on November 1, 2004 because there was no work available in conformance with his medical restrictions. Appropriate compensation benefits were paid.

A July 8, 2003 magnetic resonance imaging (MRI) scan of the right knee revealed mucoid degeneration and a probable horizontal cleavage tear of the medial meniscus. On August 11, 2003 Dr. John L. Graves, a Board-certified orthopedic surgeon, performed a partial medial meniscectomy and debridement of the femoral trochlea and diagnosed medial meniscal tear and chondromalacia of the trochlea. He noted postsurgery that appellant had persistent medial right knee pain and recommended a repeat arthroscopy. On February 6, 2004 Dr. Graves performed a debridement of the medial meniscus tear with corresponding debridement of chondromalacia of the medial tibial plateau and medial femoral condyle, removal of multiple osteocartilaginous loose bodies and debridement of minimal change chondromalacia of patella. He diagnosed medial meniscus tear with medial-sided pain and multiple cartilaginous loose bodies of the right knee. In reports dated February 23 to May 24, 2004, Dr. Graves advised that appellant was progressing well postoperatively and released to full unrestricted duty on May 3, 2004.

In July 7, 2004, appellant filed a claim for a schedule award. In a July 20, 2004 letter, the Office requested that Dr. Graves provide an evaluation of permanent impairment of the right lower extremity in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1]

On July 26, 2004 Dr. Graves advised that appellant reached maximum medical improvement on May 24, 2004. He recommended a 10 percent permanent impairment of the right lower extremity. In a report dated August 23, 2004, the Office medical adviser determined that appellant had two percent permanent impairment of the right leg for a partial medial meniscectomy. On October 13, 2004 Dr. Graves indicated that appellant had Grade 2 chondral changes over the medial and patellofemoral compartment. He recommended 10 percent permanent impairment. On November 12, 2004 the Office medical adviser again stated that appellant had two percent impairment of the right leg.

On December 6, 2004 the Office granted appellant a schedule award for two percent permanent impairment of the right leg. The award ran from June 13 to July 23, 2004.

In reports dated December 9, 2004 to February 4, 2005, Dr. Graves advised that appellant's degenerative joint disease of the right knee was nonresponsive to treatment. He

[1] A.M.A., *Guides* (5th ed. 2001).

recommended a unicompartmental right knee arthroplasty. On March 3, 2005 the Office referred appellant for a second opinion to Dr. Surendrapal Singh Mac, a Board-certified orthopedic surgeon, for a determination as to whether a right arthroplasty should be authorized by the Office. On March 28, 2005 Dr. Mac noted appellant's history and diagnosed mild degenerative arthritis. He opined that, upon physical examination and a review of x-rays, he could not recommend a total knee replacement. Appellant submitted reports from Dr. Graves who continued to recommend a right total knee replacement. In a report dated August 4, 2005, an Office medical adviser recommended a right arthroplasty.

On August 24, 2005 Dr. Graves performed a right total knee replacement and diagnosed degenerative joint disease of the right knee. He submitted reports dated September 6, 2005 to February 28, 2006 which noted that appellant was progressing well postoperatively.

The Office received documents from the North Carolina Child Support Enforcement Program requesting that it withhold child support arrearages from appellant's compensation payments. In a letter dated June 5, 2006, the Office notified the North Carolina Child Support Collections Agency that $135.69 would be withheld from appellant's compensation every 28 days for child support arrearages.

On July 21, 2006 appellant's case record was referred to the Office medical adviser. On July 24, 2006 he found that appellant sustained a 50 percent impairment of the right leg. The Office medical adviser opined that in accordance with Table 17-35 of the A.M.A., *Guides* appellant obtained fair results from the right total knee replacement.[2] He noted that, under Table 17-33 of the A.M.A., *Guides,* a total knee replacement including uniconylar replacement with fair results, represented 50 percent permanent impairment of the right lower extremity.[3]

In a report dated September 7, 2006, Dr. Graves treated appellant for right knee pain. He noted that appellant's right knee was intact neurovascularly, the wound was healing properly and range of motion was 0 to 110 degrees with no instability. On November 7, 2006 Dr. Graves advised that appellant presented with right knee pain. He noted that the right knee was stable without effusion and had excellent range of motion with flexion of 0 to 110 degrees. X-rays of the right knee revealed no problems with the knee prosthesis.

In a decision dated December 5, 2006, the Office granted appellant a schedule award for 50 percent permanent impairment of the right leg. The period of the award was from December 5, 2006 to July 29, 2009. The Office noted that appellant was previously granted a 2 percent impairment of the right leg and was entitled to an additional award of 48 percent.

In a letter dated December 13, 2006, appellant requested a lump-sum payment of his schedule award. He noted that his wife earned $9.50 per hour and they could live on her salary.

In a decision dated January 10, 2007, the Office denied appellant's request for a lump-sum payment. The Office noted that lump-sum payments of schedule awards generally would be

[2] *See* A.M.A., *Guides*, Table 17-35 at 549 (5th ed. 2001).

[3] *See id* at 546-47, Table 17-33 (5th ed. 2001).

considered in the employee's best interest when the employee did not rely upon compensation payments as a substitute for lost wages; that is the employee was working or receiving an annuity. The Office noted that appellant was not working or receiving an annuity. Additionally, the Office noted that appellant would be precluded from receiving a lump-sum payment because his compensation benefits were being garnished for child support payments.

On January 12, 2007 appellant requested reconsideration. He indicated that he had adequate income as his wife earned $10.50 per hour and had income from an additional source of $400.00 a month. The Office received a child support order dated November 18, 2004 which noted that appellant was in arrears in his child support payments and was ordered to pay $147.00 per month toward his arrears.

In a decision dated February 2, 2007, the Office denied appellant's reconsideration request as insufficient to warrant further review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] set 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.[6]

ANALYSIS -- ISSUE 1

Appellant asserts that he has greater than 50 percent permanent impairment of the right leg. The Office accepted appellant's claim for right knee contusion, right knee meniscus tear, derangement of the medial meniscus of the right knee and permanent aggravation of the right knee osteoarthritis. The Office authorized arthroscopic surgeries which were performed on August 11, 2003 and February 6, 2004 and a right total knee replacement which was performed on August 24, 2005.

In a report dated September 7, 2006, Dr. Graves treated appellant for right knee pain. He noted that appellant's right knee was neurovascularly intact, the wound was healing properly and range of motion was 0 to 110 degrees with no instability.

The medical adviser properly applied the A.M.A., *Guides* to the information provided by Dr. Graves. He made an impairment rating of 50 percent of the right lower extremity in accordance with Table 17-33 of the A.M.A., *Guides* as appellant obtained fair results from the

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *See id*.; *Jacqueline S. Harris,* 54 ECAB 139 (2002).

right total knee replacement.[7] The medical adviser opined that, under Table 17-33 of the A.M.A., *Guides*, a total knee replacement including uniconylar replacement with fair results represents 50 percent permanent impairment of a lower extremity.[8] This evaluation conforms to the A.M.A., *Guides*. The Board finds that appellant has no more than a 50 percent impairment of the right lower extremity.

The Board notes that appellant also submitted a report from Dr. Graves dated November 7, 2006, who noted that appellant's right knee was stable, without effusion and with excellent range of motion with flexion of 0 to 110 degrees. Dr. Graves noted that x-rays of the right knee revealed no problem with the knee prosthesis. Appellant did not submit any medical evidence supporting more than 50 percent permanent impairment of his right lower extremity.

The Office properly noted that appellant was previously granted a schedule award for 2 percent permanent impairment of the right leg therefore he was entitled to an additional award of 48 percent permanent impairment of the right leg.

LEGAL PRECEDENT -- ISSUE 2

Section 8135(a) of the Act,[9] which allows for the discharge of the liability of the United States by payment of lump sums, affords the Secretary of Labor discretionary authority to use lump sums as a means of fulfilling the responsibility of the Office in administering the Act. The Secretary has exercised discretion under this section by promulgation of regulation section 10.422.[10] This regulation provides that a lump-sum payment may be made to an employee entitled to a schedule award where the Office determines that such a payment is in the employee's best interest.[11] The regulation also provides that a lump-sum payment will be considered in the employee's best interest only where the employee does not rely upon compensation payments as a substitute for lost wages (that is, the employee is working or is receiving annuity payments). An employee possesses no absolute right to a lump-sum payment of benefits payable under 5 U.S.C. § 8135(b).[12]

[7] *See* A.M.A., *Guides*, Table 17-35 at 549 (5th ed. 2001).

[8] *See id.* at 546-47, Table 17-33 (5th ed. 2001).

[9] 5 U.S.C. §§ 8101-8193, 8135(a).

[10] 20 C.F.R. § 10.422.

[11] 20 C.F.R. § 10.422(b).

[12] *Id.*

The Office Procedure Manual[13] provides:

> "*Requests for Lump-Sum Payments.*
>
> b. Schedule Benefits. A lump-sum payment of schedule award benefits may still be made where the evidence shows that such a payment would be in the claimant's best interest. The regulations make it clear that there is no absolute right to a lump-sum payment of schedule benefits and every case must be considered on its individual merits using the best interest test. The regulations also state that a lump-sum payment of schedule benefits will not generally be considered in the claimant's best interest where the compensation payments are relied upon as a substitute for lost wages."
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> * * *
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> "One factor **precluding** payment of a lump-sum schedule award is garnishment of compensation benefits. (Emphasis in the original.) Although schedule award payments may be garnished, no future payment may be garnished. Because a lump-sum award is a payment of future benefits, the party entitled to payments from garnishment would no longer be able to receive these payments. Therefore, a claimant whose benefits are being garnished should not be awarded a lump sum for schedule benefits."

ANALYSIS -- ISSUE 2

The issue is whether payment of the lump-sum schedule award would be in appellant's best interest. The record establishes that appellant is not receiving a disability annuity from the employing establishment and is, therefore, relying upon his schedule award payments as a substitute for lost wages. As appellant is not receiving an annuity, payment of a schedule award in a lump sum cannot be considered in appellant's best interest in accordance with the Office's regulations.[14]

In addition, the Board notes that appellant's compensation is currently garnished. As noted, the Office procedures preclude the payment of a lump-sum schedule award when compensation benefits are garnished. The record reveals that a child support order dated November 18, 2004 from the North Carolina Child Support Enforcement Program advised that appellant was in arrears in his child support payments and ordered garnishment in the amount of $147.00 every 28 days for child support arrearage payments. The Board notes that because a lump-sum award is a payment of future benefits, the party entitled to payments from

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Lump-Sum Payments*, Chapter 2.1300(3)(b) (July 2003).

[14] 20 C.F.R. § 10.422.

garnishment, in this case the North Carolina Child Support Enforcement Program, would no longer be able to receive these payments if a lump-sum payment was granted.

As appellant is not receiving an annuity, but relies upon compensation payments as a substitute for lost wages and because his compensation wages are garnished for child support payments, the Office properly denied his request for a lump-sum payment of his schedule award as against his best interest.

LEGAL PRECEDENT -- ISSUE 3

Under section 8128(a) of the Act,[15] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[16] which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
>
> (ii) Advances a relevant legal argument not previously considered by [the Office]; or
>
> (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[17]

ANALYSIS -- ISSUE 3

Appellant's January 12, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office.

Appellant's request for reconsideration asserted that he and his wife were capable of living on his wife's salary of $10.50 per hour and an additional $400.00 a month from an outside source. However, appellant's letter does not address how the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office had previously considered appellant's assertion that he and his wife were able to live off of her wages and appellant did not set forth a particular point of law or fact that

[15] 5 U.S.C. § 8128(a).

[16] 20 C.F.R. § 10.606(b).

[17] 20 C.F.R. § 10.608(b).

the Office had not considered or establish that the Office had erroneously interpreted a point of law. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant, as noted above, did not submit any new evidence with his reconsideration request.

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied his January 12, 2007 request for reconsideration.

CONCLUSION

The Board finds that the Office properly determined that appellant had no more than a 50 percent permanent impairment of the right leg for which he received a schedule award. The Board further finds that the Office did not abuse its discretion in denying appellant's request for a lump-sum payment of a schedule award. Additionally, the Board finds that the Office properly denied appellant's request for reconsideration.[18]

[18] The Board notes that appellant did not appeal the loss of wage-earning capacity determination of December 5, 2006 and, therefore, the matter is not before the Board at this time.

ORDER

IT IS HEREBY ORDERED THAT the February 2 and January 10, 2007 and December 5, 2006 decisions of the Office Workers' Compensation Programs are affirmed.

Issued: September 14, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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