

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

N.B., Appellant)

and)

DEPARTMENT OF THE AIR FORCE,)
MATERIEL COMMAND, WRIGHT)
PATTERSON AIR FORCE BASE, OH,)
Employer)

Docket No. 07-1181
Issued: April 14, 2008

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' August 28, 2006 merit decision concerning her entitlement to schedule award compensation and the Office's December 28, 2006 decision denying her request for reconsideration. 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: (1) whether appellant met her burden of proof to establish that she has more than a five percent permanent impairment of her left leg; and (2) whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that on July 22, 1994 appellant, then a 45-year-old foreign military manager, sustained a left shoulder strain, left wrist sprain, and left knee sprain when she tripped on a fan and fell to the ground landing on her knees. She stopped work on July 22, 1994 and was terminated from the employing establishment effective October 12, 1994.

The findings of July 28, 1994 x-ray testing of appellant's left knee showed no fracture but did show "some degenerative changes about the femoral condyles and narrowing of the joint spaces medially." Hypertrophic spurs were noted about the patella.¹ In the months following her July 22, 1994 injury, appellant complained primarily of pain in her left arm (mostly in her left shoulder and wrist), left knee and low back.

The findings of a November 22, 1994 magnetic resonance imaging (MRI) scan test revealed that appellant had a right lateral disc hernia at L4-5 with broad-based disc bulging, left lateral spur at L3-4, and slight disc bulging at L3 and L4.

On June 15, 1995 Dr. Thomas F. Goodall, an attending osteopath, indicated that on examination appellant exhibited decreased perception of pinprick along the L5 and C6 nerve distributions on the left.² He also indicated in another report that on June 15, 1995 appellant reported having right lower extremity pain. On December 14, 1995 appellant reported bilateral lower extremity pain, greater on the right.

The Office referred appellant to Dr. Henry Lee King, a Board-certified orthopedic surgeon, for further evaluation of her upper and lower extremity conditions. On February 8, 1996 Dr. King stated that appellant complained of right lower extremity pain and had difficulty doing heel-to-toe walking on examination. He noted, however, that appellant did not demonstrate an antalgic gait when coming into the office. Dr. King indicated that appellant exhibited some impingement on abduction of her left shoulder and reported other findings for her shoulders. Appellant had patellofemoral arthritis of her left knee without synovitis or instability. Dr. King opined that appellant's July 22, 1994 fall did not cause the arthritis because diagnostic testing taken shortly after the fall showed a degenerative process.³ He indicated that, under the standards of the third edition of the American Medical Association, *Guides to the Evaluation of*

¹ X-ray testing of her wrist on that date showed no fracture.

² Dr. Goodall indicated that the findings of electromyogram (EMG) testing he obtained of appellant's upper and lower extremities were normal. He reported similar findings on June 15, 1995.

³ Dr. King also indicated that diagnostic testing showed a "bulging disc with some herniation at L4-5." On October 29, 2006 Jan E. Saunders, an attending osteopath, indicated that he would have to see diagnostic testing from around the time of the 1994 injury to determine whether appellant had a preexisting left knee condition. On January 31, 1996 Dr. Goodall suggested that appellant sustained a lumbar strain on July 22, 1994.

Permanent Impairment (3rd ed. 1991),⁴ appellant had an eight percent impairment of her left leg.⁵ Dr. King stated that appellant had a seven percent impairment of her whole person due to the condition of her L4-5 disc. He also indicated that appellant had an eight percent impairment of her left arm due to limited shoulder flexion and extension.

The findings of a July 26, 1996 electromyogram (EMG) and nerve conduction study of appellant's left arm showed normal results with no evidence of carpal tunnel syndrome, cervical radiculopathy or other entrapment neuropathy. On October 5, 1998 Dr. Goodall indicated that appellant continued to complain of cervical and lumbar pain with cervical and lumbar radiculopathies.

On July 2, 2002 Dr. Rudolf Hofmann, an attending Board-certified orthopedic surgeon, stated that appellant complained of pain in her left shoulder, left wrist, neck, knees and low back. He posited that appellant did not injure her back due to the July 22, 1994 fall and that she had no residuals of the July 22, 1994 injury in her left wrist or shoulder. Dr. Hofmann indicated that on examination appellant complained of left patellofemoral pain and displayed crepitation. He concluded that, under the standards of the fifth edition of the A.M.A., *Guides* (5th ed. 2001), appellant had a five percent permanent impairment of her left leg according to the footnote contained in Table 17-31.⁶ Dr. Hofmann stated, "Any joint space narrowing which [appellant] has on x-rays of her knees is not attributable to an injury at work but due to preexisting osteoarthritis of the left medial joint compartment and patellofemoral joint." On August 5, 2002 an Office medical adviser found that appellant had a five percent permanent impairment of her left leg according to the footnote contained in Table 17-31 of the A.M.A., *Guides*.⁷

On August 24, 2005 another Office medical adviser stated that Dr. Hofmann's July 2, 2002 report "was very comprehensive" and indicated that he agreed that appellant had a five percent permanent impairment of her left leg according to the footnote contained in Table 17-31 of the A.M.A., *Guides*.

In a September 9, 2005 decision, the Office granted appellant a schedule award for a five percent permanent impairment of her left leg.⁸ The award ran for 14.4 weeks from July 2 to October 10, 2002. In an August 28, 2006 decision, an Office hearing representative affirmed the

⁴ The Board notes that Dr. King should have applied the standards of the fourth edition of the A.M.A., *Guides*. See FECA Bulletin No. 94-4 (issued November 1, 1993); FECA Transmittal No. 02-12 (issued August 30, 2002); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (September 1993).

⁵ Dr. King made reference to a portion of the A.M.A., *Guides* concerning knee arthritis caused by trauma or chondromalacia.

⁶ The footnote provides, "In an individual with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on x-rays, a two percent whole person or five percent lower extremity impairment is given. A.M.A., *Guides* 544, Table 17-31, footnote.

⁷ On October 16, 2003 Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon who served as an Office referral physician, indicated that appellant did not have any permanent impairment of her left arm or left leg. Although he cited portions of the A.M.A., *Guides*, Dr. Sheridan did not explain his impairment rating.

⁸ The Office initially denied appellant's claim on February 3, 2004, but it set aside this determination in an August 9, 2005 decision and remanded the case for further development.

Office's September 9, 2005 schedule award decision. She indicated that the weight of the medical evidence on this matter rested with the July 2, 2002 of Dr. Hofmann and the August 24, 2005 opinion of the Office medical adviser. The Office hearing representative further found that the Office had not issued a formal decision regarding whether appellant had any permanent impairment of her left arm and remanded the case to the Office for additional development of this matter.⁹

In October 2006 appellant requested reconsideration of her claim. She argued that the Office's assessment of her permanent impairment did not adequately take into account her preexisting conditions, including her left knee degeneration and herniated disc at L4-5. Appellant also argued that the July 22, 1994 injury permanently aggravated both of these conditions. On November 20, 2006 Dr. Goodall indicated that appellant had a 10 percent permanent impairment of her left leg, but he did not explain the basis for this determination.

In a December 28, 2006 decision, the Office denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act¹⁰ and its implementing regulations¹¹ 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.¹² 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.¹³ A claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders, or spine.¹⁴

⁹ On May 23, 2006 Dr. Goodall indicated that Dr. King felt that appellant's disc herniation at L4-5 was directly related to her employment injury and posited that it should be "added" to appellant's claim. He also indicated that appellant's knee degeneration preexisted her employment injury. Dr. Goodall inadvertently referred to an August 25, 1994 injury rather than the July 22, 1994 injury.

¹⁰ 5 U.S.C. § 8107.

¹¹ 20 C.F.R. § 10.404 (1999).

¹² *Id.*

¹³ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

¹⁴ *Thomas J. Engelhart*, 50 ECAB 319, 320-21 (1999).

It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹⁵

ANALYSIS -- ISSUE 1

The Office accepted that on July 22, 1994 appellant, then a 45-year-old foreign military manager, sustained a left shoulder strain, left wrist sprain, and left knee sprain when she tripped on a fan and fell to the ground landing on her knees. In a September 9, 2005 award of compensation, the Office granted appellant a schedule award for a five percent permanent impairment of her left leg. The Office based its award on a July 2, 2002 report of Dr. Hofmann, an attending Board-certified orthopedic surgeon, and the August 24, 2005 report of an Office medical adviser.

In his July 2, 2002 report, Dr. Hofmann concluded that, under the standards of the fifth edition of the A.M.A., *Guides* (5th ed. 2001), appellant had a five percent permanent impairment of her left leg according to the footnote contained in Table 17-31.¹⁶ Dr. Hofmann stated, “Any joint space narrowing which [appellant] has on x-rays of her knees is not attributable to an injury at work but due to preexisting osteoarthritis of the left medial joint compartment and patellofemoral joint.”

The Board notes, however, that Dr. Hofmann improperly suggested that preexisting impairments of a given scheduled member would not be included in the calculation of permanent impairment. The Board has held 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.¹⁷

The record suggests that appellant had a preexisting impairment of her left knee which should be evaluated in connection with her entitlement to schedule award compensation for her left leg. The findings of x-ray testing of appellant’s left knee on July 28, 1994, *i.e.*, shortly after the July 22, 1994 accident, showed “some degenerative changes about the femoral condyles and narrowing of the joint spaces medially.” A review of Table 17-31 of the A.M.A., *Guides* shows that inclusion of appellant’s preexisting left knee condition in the impairment evaluation might produce a higher impairment rating than that received.¹⁸

Appellant also claimed that the impairment rating for her left leg should have included the effects of her herniated disc at L4-5. A claimant may be entitled to a schedule award for permanent impairment to a lower extremity even though the cause of the impairment originated in

¹⁵ *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹⁶ The footnote provides, “In an individual with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on x-rays, a two percent whole person or five percent lower extremity impairment is given. A.M.A., *Guides* 544, Table 17-31.

¹⁷ *See supra* note 13 and accompanying text.

¹⁸ *See* A.M.A., *Guides* 544, Table 17-31. The table provides impairment ratings for cartilage intervals of the knee.

the neck, shoulders or spine.¹⁹ Appellant argued that the disc condition preexisted her July 22, 1994 accident and was aggravated by the accident. Although the reports are not fully rationalized, the record contains reports of Dr. Goodall, an attending osteopath, and Dr. King, a Board-certified orthopedic surgeon who served as an Office hearing representative, which lends some support to this position.²⁰ Before reaching its schedule award determination, the Office did not adequately consider this aspect of appellant's schedule award claim.

Given that the Office shares in the responsibility of the development of the medical evidence, the case should be remanded to the Office for further consideration of the above-discussed matters. After such development as it deems necessary, the Office should issue an appropriate decision on appellant's entitlement to schedule award compensation for her left leg. The Board notes that, in an August 28, 2006 decision, the Office hearing representative remanded the case to the Office for the issuance of a formal decision regarding whether appellant had a permanent impairment of her left arm, but it is unclear from the record whether the Office has issued such a decision.²¹

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant did not meet her burden of proof to establish that she has more than a five percent permanent impairment of her left arm. The case is remanded to the Office for further development.

¹⁹ See *supra* note 14 and accompanying text.

²⁰ The findings of November 22, 1994 MRI scan testing revealed that appellant had a right lateral disc hernia at L4-5 with broad-based disc bulging.

²¹ Given the Board's finding concerning the merit issue of this case, it is not necessary to consider whether the Office properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 28, 2006 decision is set aside and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: April 14, 2008
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