

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

W.D., Appellant

and

**U.S POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 08-802
Issued: December 8, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2008 appellant timely appealed the August 24, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. He also timely appealed the Office's May 21, 2007 merit decision which granted an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award claim.¹

ISSUES

The issues are: (1) whether appellant is entitled to an additional schedule award; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ The record on appeal contains evidence received after the Office issued its August 24, 2007 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c) (2008).

FACTUAL HISTORY

Appellant, a 57-year-old distribution clerk, sustained a traumatic injury on September 18, 1997, which the Office accepted for lumbosacral strain, L5-S1 disc herniation and spondylosis (xxxxxx019). He also has an accepted occupational disease claim for degenerative osteoarthritis of both knees, which arose on or about November 1, 1991 (xxxxxx470).²

On May 14, 1999 the Office granted a schedule award for nine percent impairment of the right lower extremity.³ The award covered a period of 25.9 weeks from April 9 to October 7, 1999. The Office based the award on the April 29, 1999 report of its medical adviser, Dr. Ronald H. Blum, a Board-certified orthopedic surgeon.⁴

Appellant received another schedule award on March 9, 2000. This award included an additional 18 percent impairment for the right lower extremity and 20 percent impairment for the left lower extremity. The Office relied on the findings of its medical adviser, Dr. Blum.⁵ In his February 28, 2000 report, Dr. Blum found 20 percent impairment of the left lower extremity and a combined 27 percent impairment of the right lower extremity. Both the left and right lower extremity impairments included a component for arthritis-based loss of flexion in the knee. The right lower extremity rating included an additional nine percent impairment due to motor and sensory deficits involving the S1 nerve root.⁶ The Office reduced Dr. Blum's 27 percent right lower extremity impairment rating by 9 percent to reflect the award appellant previously received on May 14, 1999.

Appellant filed additional schedule award claims on April 22 and May 10, 2002. In a report dated March 28, 2003, Dr. Hazem E. Eissa, a Board-certified physiatrist, diagnosed right lumbar radiculopathy and bilateral knee degenerative joint disease with decreased range of motion. Dr. Eissa found that appellant had a combined whole person impairment of 42 percent. He assigned 13 percent whole person impairment for appellant's lumbar spine injury (diagnosis-related estimate or DRE Lumbar Category III), 4 percent for right knee loss of flexion, and 14 percent each for varus deformity of both knees.

² The Office accepted appellant's bilateral knee condition on December 14, 1999, and then combined the two claim files, with claim number xxxxxx019 (back) designated the master file and claim number xxxxxx470 (knees) designated the subsidiary file.

³ This schedule award predated the Office's acceptance of appellant's bilateral knee condition.

⁴ Dr. Blum reviewed the April 9, 1999 report of Dr. Gregg A. Bendrick, appellant's then-treating physician, who found nine percent impairment of the right lower extremity due to motor and sensory deficits involving the L5 nerve root. Dr. Bendrick also found an additional seven percent whole person impairment due to Grade 1 spondylolisthesis of the lumbar spine.

⁵ Dr. Blum reviewed a February 18, 2000 impairment rating from Dr. Bendrick.

⁶ Dr. Bendrick similarly assessed nine percent impairment due to motor and sensory deficits affecting the right lower extremity. He offered a slightly lower rating (15 percent) regarding appellant's arthritis-based loss of knee flexion, bilaterally.

The Office referred appellant to Dr. Stephen Kushner, a Board-certified physiatrist. In a November 7, 2003 report, Dr. Kushner found seven percent impairment of the right lower extremity due to appellant's lumbar condition, which he identified as right S1 radiculopathy. He noted four percent impairment for sensory deficit and three percent impairment for motor deficit involving the S1 nerve root. With respect to appellant's bilateral knee condition, Dr. Kushner noted a "significant varus deformity." He found 35 percent impairment in each lower extremity due to varus deformity. When combined with appellant's back-related motor and sensory deficits, the right lower extremity impairment was 40 percent compared to 35 for the left lower extremity.

On March 4, 2005 the Office medical adviser, Dr. H. Mobley, reviewed Dr. Eissa's March 28, 2003 report. He found four percent impairment of the right lower extremity due to sensory deficit involving the S1 nerve root. Dr. Mobley further noted that no consideration was given to the knee disorders because "the knees are not accepted as job-related conditions." He also did not consider Dr. Kushner's November 7, 2003 report.

On May 26, 2005 the Office granted a schedule award for four percent impairment of the right lower extremity.⁷ By decision dated February 2, 2007, an Office hearing representative set aside the May 26, 2005 schedule award. The hearing representative found that the Office had not properly considered all relevant evidence, particularly Dr. Kushner's November 7, 2003 impairment rating.⁸

On February 28, 2007 Dr. Mobley reviewed the record, including Dr. Kushner's November 7, 2003 report, and found seven percent impairment of the right lower extremity. His rating was based on motor and sensory deficits involving the S1 nerve root. Dr. Mobley also noted that Dr. Kushner had assigned additional impairment for both lower extremities due to severe knee varus. However, he explained that "no consideration [was] given for the knee varus because the knees are not accepted as job[-]related conditions."

On May 21, 2007 the Office awarded an additional three percent impairment for the right lower extremity.⁹

Appellant requested reconsideration on June 10, 2007. He questioned why his knee condition had not been included in his schedule award given that his accepted back and bilateral knee injuries were combined under master file number xxxxxx019.

⁷ The May 26, 2005 decision did not reference either of appellant's two prior schedule awards.

⁸ The hearing representative also did not mention appellant's two prior schedule awards. There was also no reference to appellant's accepted bilateral knee condition.

⁹ Although Dr. Mobley found seven percent impairment for motor and sensory deficits, the Office reduced the award by four percent in light of the May 26, 2005 schedule award. It, however, did not consider whether the May 26, 2005 award and this latest award were duplicative of the awards appellant received on May 14, 1999 and March 9, 2000.

In a decision dated August 24, 2007, the Office denied appellant's request for reconsideration. It found that appellant neither raised any substantive legal questions nor presented any new and relevant evidence. The Office further indicated that the file did not show that appellant's "bilateral knee condition [had] ever been an accepted condition...."

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹⁰ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.¹¹ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).¹²

ANALYSIS

Appellant seeks an additional schedule award for impairment attributable to his bilateral knee condition. The Board finds that the case is not in posture for decision. The record reflects that appellant has received schedule awards totaling 34 percent impairment for the right lower extremity and 20 percent impairment for the left lower extremity. Of the four separate awards appellant received, the March 9, 2000 schedule award was the only decision that addressed appellant's lower extremity impairments attributable to both his accepted back condition and bilateral knee condition. The two most recent schedule awards, dated May 26, 2005 and May 21, 2007, focused exclusively on appellant's accepted back condition and its affect on the right lower extremity. These awards were based on the opinion expressed by Office medical adviser, Dr. Mobley. In his March 4, 2005 and February 28, 2007 reports, he disregarded medical evidence of lower extremity impairment attributable to appellant's bilateral knee condition. Dr. Mobley mistakenly stated that the Office had not accepted appellant's bilateral knee condition as job related. The Office made a similar mistake in its August 24, 2007 nonmerit decision when it stated that the file did not show that appellant's "bilateral knee condition [had] ever been an accepted condition...." The record on appeal clearly indicates that on December 14, 1999 the Office accepted degenerative osteoarthritis of both knees under claim number xxxxxx470, and subsequently combined that claim with claim number xxxxxx019 designated as the master file.

As to whether appellant may be entitled to an additional schedule award, Dr. Eissa and Dr. Kishner agreed with respect to the extent of appellant's permanent impairment due to vagus

¹⁰ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2000).

¹¹ 20 C.F.R. § 10.404.

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

deformity. The primary difference between their respective reports was that Dr. Eissa expressed his opinion based on whole person impairment rather than lower extremity impairment. However, the 14 percent whole person impairment Dr. Eissa identified represents a 35 percent lower extremity impairment, which is identical to Dr. Kishner's finding.¹³ As noted, the Office did not consider this evidence based on the mistaken premise that appellant's bilateral knee condition had not been accepted as job related.

The case will be remanded for a proper review of the evidence and issuance of an appropriate final decision.¹⁴ On remand, the Office should also consider whether any additional schedule awards are duplicative of prior awards.¹⁵

CONCLUSION

The case is not in posture for decision.

¹³ See A.M.A., *Guides* 537, Table 17-10. Dr. Eissa also found 13 percent whole person impairment due to lumbar spine injury (DRE Lumbar Category III, Table 15-3, A.M.A., *Guides* 384). Neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a); see *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

¹⁴ In light of the Board's disposition on the merits of the claim, the issue of whether the Office properly denied reconsideration is moot.

¹⁵ See 5 U.S.C. § 8108.

ORDER

IT IS HEREBY ORDERED THAT the August 24 and May 21, 2007 decisions of the Office of Workers' Compensation Programs are set aside, and the case remanded for further consideration consistent with this decision.

Issued: December 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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