

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

J.S., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
NATIONAL GUARD, Newburgh, NY, Employer**

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**Docket No. 07-2045
Issued: February 4, 2008**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2007 appellant filed a timely appeal from a January 26, 2007 merit decision of the Office of Workers' Compensation Programs granting him a schedule award and a June 28, 2007 decision of a hearing representative affirming the schedule award determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decisions.

ISSUES

The issues are: (1) whether appellant has more than a 28 percent permanent impairment of the right lower extremity; and (2) whether he is entitled to a schedule award for an impairment of the left lower extremity.

FACTUAL HISTORY

On May 15, 1997 appellant, then a 47-year-old aircraft mechanic, filed a claim for an injury to his knees occurring on that date when he slipped and fell on hydraulic fluid. The Office accepted his claim for bilateral knee strain and a torn meniscus of the right knee. Appellant underwent a partial medial and lateral meniscectomy of the right knee on March 11, 1998. The

physician diagnosed a chronic patella subluxation with osteoarthritis. On January 21, 2003 appellant underwent a partial medial and lateral meniscectomy of the left knee.¹

On January 31, 2002 appellant filed a claim for a schedule award. By letter dated June 16, 2003, the Office requested that his attending physician, Dr. Robert C. Hendler, a Board-certified orthopedic surgeon, provide an opinion on the extent of any permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (5th ed. 2001) (A.M.A., *Guides*). In a July 17, 2003 response, Dr. Hendler recommended repeat surgery on appellant's left knee.

In an impairment evaluation dated May 14, 2004, Dr. Bradley D. Wiener, a Board-certified orthopedic surgeon, opined that appellant had reached maximum medical improvement of the right knee. He listed findings of mild atrophy of the right quadriceps and tenderness to palpation of the medial and lateral patella facets with no evidence of laxity. Dr. Wiener measured range of motion of the right knee from 3 to 115 degrees. He interpreted x-rays as showing "severe degenerative joint disease along the patellofemoral joint with mild to moderate medial joint line narrowing." Dr. Wiener concluded, "At this time I feel that he has significant arthritis within his knee, which, given the narrowing that is found across the patellofemoral joint, as well as the medial hemijoint, gives him a 20 percent disability for the lower extremity and an 8 percent whole person disability rating."

On January 21, 2005 the Office requested that Dr. Wiener provide the date of maximum medical improvement and a description of his calculations under the A.M.A., *Guides*. The Office enclosed forms for his attending physician to complete.

On September 2, 2005 the Office requested that appellant submit a report from his attending physician addressing the extent of any permanent impairment of the bilateral knees under the A.M.A., *Guides*.² In an impairment rating dated November 8, 2005, Dr. John Paul Reeve, a chiropractor, found that he had no impairment of the left lower extremity. For the right lower extremity, he found a seven percent impairment for mild gait derangement according to Table 17-5 on page 529 of the A.M.A., *Guides*. Dr. Reeve further opined that appellant had Grade 4 muscle weakness of the knee, which constituted a 10 percent impairment.³ He interpreted x-rays as revealing a two millimeter loss of joint cartilage of the knee for a 20 percent impairment and a two millimeter loss of patellofemoral cartilage for a 15 percent impairment.⁴ Dr. Reeve measured range of motion of the knee and found that appellant had a 10 percent impairment.⁵ He further found a 7 percent impairment due to patellar subluxation, a 7 percent impairment due to collateral ligament loss and a 10 percent impairment due to the partial medial

¹ The Office placed appellant on the periodic rolls effective January 31, 1998. In a decision dated February 18, 1999, the Office determined that he had no loss of wage-earning capacity effective October 19, 1998 as his actual earnings as a technical order distribution coordinator fairly and reasonably represented his wage-earning capacity.

² Appellant relocated subsequent to Dr. Wiener's May 14, 2004 evaluation.

³ A.M.A., *Guides* 532, Table 17-8.

⁴ *Id.* at 544-45, Table 17-31.

⁵ *Id.* at 537, Table 17-10.

and lateral meniscectomy.⁶ Dr. Reeve concluded that appellant had a 65 percent impairment of the right lower extremity and no impairment of the left lower extremity.

In a form report and letter dated January 13, 2006, Dr. Wiener found that appellant had a 16 percent impairment of the right knee. He listed Tables 17-5 and 17-9 through 17-30 on pages 529 and 507-13 of the A.M.A., *Guides* as the basis for his determination.

On March 21, 2006 an Office medical adviser reviewed Dr. Reeve's report. He concurred with Dr. Reeve's finding that appellant had a 20 percent right lower extremity impairment due to two millimeters of narrowing of the joint face of the right knee⁷ and a 10 percent impairment due to his partial medial and lateral meniscectomy.⁸ The Office medical adviser combined the 20 percent impairment due to arthritis with the 10 percent impairment due to the partial meniscectomies to find a 28 percent right lower extremity impairment. He noted that there was no evidence supporting an impairment of the left lower extremity. The Office medical adviser indicated that Dr. Reeve's findings were not in accordance with the A.M.A., *Guides*.

By decision dated January 26, 2007, the Office granted appellant a schedule award for a 28 percent permanent impairment of the right leg and no impairment of the left leg. The period of the award ran for 80.64 weeks from May 1, 1999 to November 15, 2000. In an accompanying memorandum, the Office noted that Dr. Wiener failed to explain his calculations under the A.M.A., *Guides*. The Office further found that Dr. Reeve's report was of little probative value as he was a chiropractor.

On February 7, 2007 appellant requested a review of the written record. By decision dated June 28, 2007, the hearing representative affirmed the January 26, 2007 decision.

LEGAL PRECEDENT -- ISSUES 1 & 2

The schedule award provision of the Federal Employees' Compensation Act,⁹ and its implementing federal regulations,¹⁰ 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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all

⁶ *Id.* at 546, Table 17-33.

⁷ *Id.* at 544, Table 17-31.

⁸ *Id.* at 546, Table 17-33.

⁹ 5 U.S.C. § 8107.

¹⁰ 20 C.F.R. § 10.404.

claimants.¹¹ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.¹²

ANALYSIS -- ISSUES 1 & 2

The Office accepted appellant's claim for bilateral knee strain and a torn meniscus of the right knee. He had a partial medial and lateral meniscectomy of the right knee on March 11, 1998. On January 31, 2002 he filed a claim for a schedule award. Appellant underwent a partial medial and lateral meniscectomy of the left knee on January 21, 2003. On July 17, 2003 his attending physician, Dr. Hendler, opined that he required repeat surgery on his left knee.

In an impairment evaluation dated May 14, 2004, Dr. Wiener found that appellant had reached maximum medical improvement of the right knee. On examination he found mild atrophy of the right quadriceps, tenderness to palpation of the medial and lateral patella facets and no laxity. Dr. Wiener measured range of motion of the right knee from 3 to 115 degrees and found that x-rays revealed severe patellofemoral joint arthritis. He found that appellant had a 20 percent impairment due to arthritis. Dr. Wiener did not, however, reference the tables and pages of the A.M.A., *Guides* in reaching his impairment determination. The Office requested that he clarify how he reached his findings by citing to the A.M.A., *Guides*. In a report dated January 13, 2006, Dr. Wiener opined that appellant had a 16 percent impairment of the right knee. In an accompanying form, he referenced Tables 17-5 and 17-9 through 17-30 on pages 529 and 507-13 of the A.M.A., *Guides*. He did not, however, explain how he utilized the cited tables and pages of the A.M.A., *Guides* in reaching his determination and thus his opinion is of little probative value.¹³

Appellant submitted a November 8, 2005 impairment evaluation from Dr. Reeve, a chiropractor. Dr. Reeve found that appellant had a 65 percent impairment of the right lower extremity and no impairment of the left lower extremity citing to the tables and pages of the A.M.A., *Guides*. The Board notes, however, that chiropractors are defined as physicians under the Act only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.¹⁴ Dr. Reeve's report, consequently, does not constitute medical evidence.

On March 21, 2006 an Office medical adviser reviewed Dr. Reeve's findings and opined that appellant had a 10 percent impairment of the right lower extremity due to his partial medial and lateral meniscectomy.¹⁵ He further determined that appellant had a 20 percent impairment

¹¹ 20 C.F.R. § 10.404(a).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

¹³ *Mary L. Henninger*, 52 ECAB 408 (2001).

¹⁴ 5 U.S.C. § 8101(2); *Isabelle Mitchell*, 55 ECAB 623 (2004).

¹⁵ A.M.A., *Guides* 546, Table 17-33.

due to the loss of two millimeters of knee cartilage.¹⁶ The Office medical adviser properly found that the 10 percent impairment due the prior surgery and the 20 percent impairment due to arthritis could be combined, which yielded a right lower extremity impairment of 28 percent.¹⁷ He additionally determined that there was no evidence supporting an impairment of the left lower extremity. The Board finds that the record contains no probative medical evidence establishing that appellant has more than a 28 percent right lower extremity impairment or any impairment of the left lower extremity.

On appeal, appellant contends that the Office should have informed him of the limitations on chiropractors under the Act and further developed the medical evidence by referring him for a second opinion examination. He also argues that he is entitled to a schedule award for the left lower extremity. Appellant, however, has the burden of proof to submit evidence establishing the extent of his permanent impairment under the Act. While the Office may require an employee to undergo a physical examination as it deems necessary, the determination of the need for the examination is a matter within the province and discretion of the Office.¹⁸ He has not submitted probative evidence showing that he has more than a 28 percent impairment of the right lower extremity or an impairment of the left lower extremity.¹⁹

Appellant additionally argues that he is entitled to an additional award for the right lower extremity due to pain. The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's permanent impairment of the leg is 28 percent, he is entitled to 28 percent of 288 weeks, or 80.64 weeks of compensation.²⁰

CONCLUSION

The Board finds that appellant has no more than a 28 percent permanent impairment of the right lower extremity. The Board further finds that there is no evidence establishing that he has a permanent impairment of the left lower extremity.

¹⁶ *Id.* at 544, Table 17-31.

¹⁷ *Id.* at 526, Table 17-2.

¹⁸ *See* 5 U.S.C. § 8123; *Dana D. Hudson*, 57 ECAB ___ (Docket No. 05-300, issued January 9, 2006).

¹⁹ Dr. Hendler indicated in a July 17, 2003 report that appellant required additional surgery on his left knee. In order to receive a schedule award for an injured member of the body, a claimant must be at maximum medical improvement. Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. *See Mark A. Holloway*, 55 ECAB 321 (2004).

²⁰ Appellant retains the right to file a claim for an increased schedule award before the Office based on new exposure or on medical evidence indicating that the progression of an employment-related condition, without exposure to new employment factors, has resulted in a greater permanent impairment than previously calculated. *Linda T. Brown*, 51 ECAB 115 (1999).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 28 and January 26, 2007 are affirmed.

Issued: February 4, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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