

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

S.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
 VETERANS ADMINISTRATION MEDICAL
 CENTER, Muskogee, OK, Employer**

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**Docket No. 08-475
 Issued: June 10, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 6, 2007 appellant filed a timely appeal from the Office of Workers’ Compensation Programs’ October 23, 2007 merit decision concerning her entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she is entitled to a schedule award for permanent impairment of her right leg or to establish that she has more than a 37 percent permanent impairment of her left leg, for which she received a schedule award.

FACTUAL HISTORY

The Office accepted that on September 8, 1987 appellant, then a 49-year-old nursing assistant, sustained bilateral knee strains due to twisting her knees while stepping off a curb. It authorized a left partial lateral meniscectomy which was performed on November 30, 1993 and a

repeat left partial lateral meniscectomy with chondroplasty which was performed on April 22, 1996.

On June 25, 1998 Dr. Fred M. Ruefer, an attending Board-certified orthopedic surgeon, performed total left knee replacement surgery. The procedure was authorized by the Office. On May 11, 1999 Dr. Ruefer indicated that appellant's total left knee replacement warranted a 37 percent permanent impairment rating for her left leg under the relevant standards of the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). In an August 13, 1999 decision, the Office granted appellant a schedule award for a 37 percent permanent impairment of her left leg. The award ran for 106.56 weeks from January 20, 1999 to February 3, 2001.

In a September 14, 2005 report, Dr. Ruefer indicated that appellant came in complaining of right knee pain, with an insidious onset, that gradually got worse. He noted that appellant had good range of motion of the right knee (from 0 to 130 degrees) with significant crepitus, 1+ effusion and 2+ anterior instability secondary to anterior cruciate deficit. Appellant had a valgus deformity of the right knee, but that sensation and motor function were intact.¹ Dr. Ruefer diagnosed severe osteoarthritis of the right knee. In another September 14, 2005 report, he stated that appellant did not yet require a total knee replacement on the right.

In an undated form report received by the Office on July 20, 2007, Dr. Ruefer indicated he performed a right total knee replacement on appellant.² In a June 19, 2007 report, he stated that appellant was concerned that her right knee still hurt and noted that "it still should as it really has not been that long since surgery." Dr. Ruefer indicated that appellant's right knee had range of motion from 0 to 95 degrees and her surgical incision had healed nicely. He noted that right knee pain was decreasing, that there was no instability with normal patellar tracking, and that the neurovascular and integumental aspects of the right knee were intact. Dr. Ruefer diagnosed "well-functioning total knee on the right hand side" and stated, "In my medical opinion, based upon reasonable degree of medical certainty and in accordance with the fifth edition of the [A.M.A., *Guides*], this patient has sustained 15 percent permanent ... impairment to the knee."

On July 9, 2007 appellant filed a claim for a schedule award. In a July 30, 2007 letter, the Office asked Dr. Ruefer to indicate whether appellant had reached maximum medical improvement and to provide a rating for lower extremity permanent impairment according to the standards of the A.M.A., *Guides*.³

In an October 23, 2007 decision, the Office denied appellant's schedule award claim indicating that she did not meet her burden of proof to establish that she is entitled to a schedule award for permanent impairment of her right leg or to establish that she has more than a 37 percent permanent impairment of her left leg, for which she received a schedule award. The

¹ Dr. Ruefer noted that appellant had range of motion from 0 to 130 degrees in her left knee with no instability.

² Dr. Ruefer did not specify the date of the surgery but he noted that appellant was admitted to the hospital on December 8, 2006.

³ A copy of the July 30, 2007 letter was also sent to appellant's current mailing address.

Office indicated that the June 19, 2007 report of Dr. Ruefer was not sufficient to support a finding that appellant was entitled to additional schedule award compensation.⁴

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulations⁶ 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.⁷ A determination on permanent impairment should not be made until maximum medical improvement has been reached for a given scheduled member, *i.e.*, the physical condition of the member has stabilized despite the possibility of an eventual change in the degree of functional impairment in the member.⁸

ANALYSIS

The Office accepted that on September 8, 1987 appellant sustained bilateral knee strains due to twisting her knees while stepping off a curb. It authorized several surgical procedures including a total left knee replacement performed on June 25, 1998 by Dr. Ruefer, an attending Board-certified orthopedic surgeon. On August 13, 1999 the Office granted appellant a schedule award for a 37 percent permanent impairment of her left leg. Appellant claimed entitlement to additional schedule award compensation and, in an October 23, 2007 decision, the Office denied appellant's schedule award claim indicating that she did not meet her burden of proof to establish that she is entitled to a schedule award for permanent impairment of her right leg or to establish that she has more than a 37 percent permanent impairment of her left leg, for which she received a schedule award.

The Board finds that appellant has not submitted sufficient medical evidence to establish entitlement to additional schedule award compensation. Appellant submitted a June 19, 2007 report in which Dr. Ruefer concluded, "In my medical opinion, based upon reasonable degree of medical certainty and in accordance with the fifth edition of the [A.M.A., *Guides*], this patient has sustained 15 percent permanent ... impairment to the knee."⁹ However, this report is of

⁴ It does not appear that Dr. Ruefer responded to the Office's request for additional information.

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404 (1999).

⁷ *Id.*

⁸ See *Tonya D. Bell*, 43 ECAB 845, 847 (1992).

⁹ Dr. Ruefer indicated that appellant's right knee had range of motion from 0 to 95 degrees and her surgical incision had healed nicely. He noted that right knee pain was decreasing, that there was no instability with normal patellar tracking and that the neurovascular and integumental aspects of the right knee were intact.

limited probative value on the relevant issue of the present case for two reasons. First, Dr. Ruefer did not provide a clear opinion that appellant's right knee had reached maximum medical improvement.¹⁰ It appears that appellant had undergone total left knee replacement surgery several months prior, although the precise date of the surgery is unclear. As noted above, determination on permanent impairment should not be made until maximum medical improvement has been reached for a given scheduled member, *i.e.*, the physical condition of the member has stabilized despite the possibility of an eventual change in the degree of functional impairment in the member.¹¹ Second, Dr. Ruefer did explain how his conclusion that appellant had a 15 percent permanent impairment of her right leg comported with the standards of the A.M.A., *Guides*. There are specific tests and evaluation techniques in the A.M.A., *Guides* for assessing permanent impairment of the lower extremities, but Dr. Ruefer did not explain how such standards would be applied in appellant's case.¹²

The opinion of Dr. Ruefer is of limited probative value regarding appellant's right leg impairment in that Dr. Ruefer failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹³ Appellant did not submit any other relevant medical evidence and the Office properly denied her claim for a right leg schedule award. She did not submit any medical evidence containing an impairment rating for her left leg and therefore the Office properly found that there was no basis to find that she has more than a 37 percent permanent impairment of her left leg, for which she received a schedule award.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she is entitled to a schedule award for permanent impairment of her right leg or to establish that she has more than a 37 percent permanent impairment of her left leg, for which she received a schedule award.

¹⁰ Dr. Ruefer stated that appellant was concerned that her right knee still hurt and noted that "it still should as it really has not been that long since surgery."

¹¹ See *supra* note 8 and accompanying text. Dr. Ruefer did not respond to the Office's request for additional information regarding the matter of maximum medical improvement.

¹² See A.M.A., *Guides* 523-64, Chapter 17.

¹³ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 23, 2007 decision is affirmed.

Issued: June 10, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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