

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

C.W., Appellant)

and)

DEPARTMENT OF THE NAVY, STRATEGIC)
WEAPONS FACILITY PACIFIC,)
Silverdale, WA, Employer)

**Docket No. 09-391
Issued: August 19, 2009**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 24, 2008 appellant filed a timely appeal from a November 10, 2008 merit decision of the Office of Workers' Compensation Programs denying his claim for an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision.

ISSUE

The issue is whether appellant has more than a 51 percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

This case is before the Board for the second time. On prior appeal, the Board set aside a December 9, 2002 decision finding that appellant had a two percent permanent impairment of the

left leg.¹ The Board noted that appellant's attending physician, Dr. Marc I. Suffis, Board-certified in emergency medicine, found that appellant had a two percent permanent impairment of the left leg due to his partial medial meniscectomy according to Table 17-33 on page 546 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) (A.M.A., *Guides*). The Board found, however, the Office failed to consider whether appellant had a preexisting impairment of the left knee in calculating the extent of his permanent impairment. The Board remanded the case for the Office to request that Dr. Suffis address whether appellant had a preexisting impairment due to left knee arthritis. The findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

In a report dated October 13, 2003, Dr. Suffis determined that appellant had a 50 percent left lower extremity impairment due to arthritis pursuant to Table 17-31 on page 544 of the A.M.A., *Guides*. He added the 3 percent impairment that he found due to his medial meniscectomy and concluded that he had 52 percent impairment of the lower extremity. Dr. Suffis noted that range of motion was not included in assessing impairments due to arthritis.

An Office medical adviser reviewed Dr. Suffis report on November 16, 2003 and found that appellant had 2 percent impairment due to his partial meniscectomy rather than 3 percent impairment, for a total left lower extremity impairment of 51 percent.² By decision dated December 11, 2003, the Office granted appellant a schedule award for a 51 percent permanent impairment of the left leg. The period of the award ran for 146.88 weeks from February 12, 2002 to December 6, 2004.

On November 28, 2006 appellant underwent an authorized left total knee arthroplasty. On August 25, 2007 he filed a claim for an increased schedule award. On August 29, 2008 the Office requested that appellant submit a report from his attending physician addressing the extent of any permanent impairment in accordance with the A.M.A., *Guides*.

In a report dated September 29, 2008, Dr. Suffis diagnosed a medial meniscal tear causing degenerative arthritis and resulting in left knee arthrodesis. He noted that appellant underwent the total left knee arthroplasty on November 28, 2006 with a good result. Dr. Suffis measured range of motion of the left knee as 105 degrees flexion and minus 10 degrees extension. Applying Table 17-35 on page 549 and Table 17-33 on page 547 of the A.M.A., *Guides*, he found that appellant had 45 points for mild pain, 22 points for range of motion and 25 points for stability for a total of 92 points. Dr. Suffis subtracted 5 points for a mild extension lag to find a total of 87 points, which he found equaled a 37 percent permanent impairment of the left lower extremity due to his total knee replacement.³

On November 6, 2008 an Office medical adviser reviewed Dr. Suffis' report. He concurred with his finding that appellant had a 37 percent left lower extremity impairment.

¹ Docket No. 03-728 (issued June 6, 2003). The Office accepted that appellant sustained a contusion of the left buttock, a left knee strain and a tear of the medial meniscus of the left knee due to a May 30, 2000 employment injury. On July 17, 2000 appellant underwent a partial medial meniscectomy.

² A.M.A., *Guides* 546, Table 17-33.

³ *Id.* at 547, Table 17-35.

By decision dated November 10, 2008, the Office denied appellant's claim for an increased schedule award. It noted that appellant had previously received an award for 51 percent impairment but the current medical evidence established that he had only a 37 percent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act,⁴ and its implementing federal regulations,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 for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁶ 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, 2001.⁷

Where a claimant has previously received a schedule award and subsequently claims an additional schedule award due to a worsening of his or her condition, the claimant bears the burden of proof to establish a greater impairment causally related to the employment injury.⁸

ANALYSIS

By decision dated January 29, 2008, the Board remanded the case for the Office to determine whether appellant had more than a two percent permanent impairment of the left lower extremity due to his preexisting arthritis. On remand the Office found that Dr. Suffis' October 13, 2003 report established that appellant had a 50 percent impairment due to left knee arthritis under Table 17-31 on page 544 of the A.M.A., *Guides* and a 2 percent impairment for a left partial medial meniscectomy according to Table 17-33 on page 546 of the A.M.A., *Guides*, for a total left lower extremity impairment of 51 percent.

On August 25, 2007 appellant filed a claim for an increased schedule award. In a report dated September 29, 2008, Dr. Suffis found that he had a 37 percent impairment of the left lower extremity based on a good result from his November 28, 2006 left knee arthroplasty.⁹ He found that appellant had 45 points for mild pain, 22 points for range of motion and 25 points for stability for a total of 92 points. Dr. Suffis subtracted 5 points for a mild extension lag to find a total of 87 points.¹⁰ Table 17-33 on page 547 of the A.M.A., *Guides* provides that a good result

⁴ 5 U.S.C. § 8107.

⁵ 20 C.F.R. § 10.404.

⁶ *Id.* at 10.404(a).

⁷ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

⁸ *Edward W. Spohr*, 54 ECAB 806 (2003).

⁹ A.M.A., *Guides* 549, 547, Tables 17-35, 17-33.

¹⁰ *Id.*

for a total knee replacement is 85 to 100 points. As appellant's result of 87 points fell in the good category, he had a 37 percent impairment of the left leg. An Office medical adviser reviewed Dr. Suffis' report and concurred with his finding of 37 percent impairment due to the total knee replacement. Appellant has not submitted any evidence subsequent to his total knee replacement showing that he has a greater impairment.¹¹ The Office thus properly denied his claim for an increased schedule award.

CONCLUSION

The Board finds that appellant has no more than a 51 percent permanent impairment of the left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 10, 2008 is affirmed.

Issued: August 19, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ See *Edward W. Spohr, supra* note 8.