United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
and	)	**Docket No. 08-1938**
	)	**Issued: September 24, 2009**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Fort Worth, TX, Employer	)	

Appearances:
Sandra Green, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 3, 2008 appellant filed a timely appeal of the June 9, 2008 merit decision of the Office of Workers' Compensation Programs which found that he was entitled to an additional schedule award for his left lower extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award case.

ISSUE

The issue is whether appellant has more than 50 percent impairment to his left lower extremity, for which he received schedule awards.

On appeal appellant contends that the Office incorrectly paid him an additional schedule award for 13 percent impairment to the left leg rather than an additional 21 percent.

FACTUAL HISTORY

This case was previously before the Board. In a January 4, 1999 decision, the Board affirmed a February 5, 1996 Office decision granting a schedule award for 10 percent

impairment of his left leg.[1] The facts of the case as set forth in the prior decision are incorporated by reference.[2]

On May 3, 2000 an Office medical adviser reviewed additional medical evidence from Dr. Myron L. Glickfeld, an attending physician, pertaining to impairment to appellant's left leg. He determined that appellant had 11 percent impairment to the lower extremity based upon sensory and motor deficits of the L5 nerve root.

On May 4, 2000 the Office granted appellant a schedule award for an 11 percent permanent impairment of the left lower extremity. The period of the award was March 24 to November 1, 2000. The Board notes that this award did not take into consideration the 10 percent granted in 1996. Therefore, appellant received awards in the total amount of 21 percent impairment of the left leg.

The record reveals that, following appellant's 2000 right knee injury; the Office accepted that he sustained a left knee lateral collateral ligament strain and authorized left knee surgery, which was performed on September 7, 2004.[3] On December 28, 2004 appellant filed a claim for an additional schedule award.

In a December 3, 2004 report, Dr. Bill Weldon, an attending osteopath, diagnosed left knee pain and medial and lateral meniscectomy. He reported 97 degrees left knee flexion representing 10 percent impairment and 3 degrees left knee extension representing 0 (no) impairment based on loss of range of motion. Dr. Weldon also stated that appellant had 10 percent impairment under Table 17-33 for the partial medial and lateral meniscectomies. As an magnetic resonance imaging scan showed a partial patellar subluxation, he found an additional seven percent impairment under Table 17-33. Combining the three impairing elements under the Combined Values Chart, Dr. Weldon found a total of 25 percent impairment to the left leg. He did not consider the cross-usage chart at Table 17-2 in making his impairment rating.

In a March 25, 2005 report, Dr. Meador, an Office medical adviser, reviewed the medical evidence and found that appellant had 16 percent left lower extremity impairment due to his patellar subluxation and the partial medial and lateral meniscectomy surgery under Table 17-33, page 546. He noted that the cross-usage chart prohibited combining diagnostic-based

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[1] Docket No. 96-1928 (issued January 31, 1999). The initial award based on sensory and motor loss in the L5 distribution affecting the left leg. The Board also affirmed the Office's January 31, 1996 determination that appellant's actual earnings as a modified-duty mail processor fairly and reasonably represented his wage-earning capacity. This determination was subsequently modified on April 27, 2000 and August 6, 2007. This aspect of appellant's claim is not before the Board in the present appeal. *See* 20 C.F.R. § 501.2(c).

[2] On April 29, 1994 appellant injured his left leg and low back while in the performance of duty. The Office accepted sprains of the lumbar spine, left hip and thigh and a displaced lumbar disc without myelopathy for which surgery was performed. On May 31, 1997 and June 18, 1998 appellant sustained recurrences of disability accepted by the Office under file number xxxxxx849. On October 5, 2000 he sustained a right knee injury, accepted for a torn medical meniscus under file number xxxxxx838. There is some indication that file number xxxxx849 has been designated the master file.

[3] By decision dated April 10, 2002, the Office issued appellant a schedule award for a nine percent permanent impairment of his right lower extremity.

impairment with loss of range of motion impairments. Therefore, the 10 percent impairment for loss of left knee flexion could not be included in the impairment rating. The Office medical adviser combined the 7 percent impairment for the patellar subluxation with the 10 percent impairment based on surgery, to find 16 percent left leg impairment.

By decision dated April 8, 2005, the Office granted appellant a schedule award for nine percent impairment to the right lower extremity. However, by letter dated April 11, 2005, the Office claims examiner advised appellant: "The [d]istrict [m]edical adviser set your combined impairment rating at 17 percent for permanent partial disability at 17 percent for … your left and right lower extremity. The decision you received dated April 8, 2005 inadvertently input the incorrect percentage of [nine]. You are due an additional [eight] percent which increases your days from 181.44 to 342.722 an additional 161.28 days that you are entitled to." Not exactly a model of clarity. Apparently, appellant was to deduce that he was being awarded an additional 16 percent impairment of the left leg. This brought the total of the three awards granted for the left leg to 38 percent.

On June 6, 2006 appellant filed a claim for an increased schedule award. In an August 3, 2006 report, Dr. John A. Sklar, a second opinion Board-certified physiatrist, concluded that appellant had a seven percent impairment of the left leg due to spinal root nerve deficits. He stated that appellant reached maximum medical improvement on May 22, 2006. Dr. Sklar applied Table 15-18, page 424 and Table 15-16, page 424 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

On September 6, 2006 the Office medical adviser agreed that appellant had seven percent impairment of his left lower extremity due to spinal root impairment.

On September 21, 2006 the case was returned to the Office medical adviser for further review. However, the claims examiner referenced only two of the prior left leg awards, the 11 percent granted in 2000 and the more recent award in 2005 for 16 percent.

On October 5, 2006 the Office medical adviser noted the findings of Dr. Sklar with regard to appellant's impairment due to L5 radiculopathy. He noted the prior awards in 2000 (11 percent based on radiculopathy) and in 2005 (16 percent diagnosis-based Table 17-33) which totaled 27 percent. The Office medical adviser advised that Dr. Sklar's report did not establish any greater impairment to the left leg, as it indicated a recent improvement of the L5 radiculopathy.[4]

By decision dated October 18, 2006, the Office granted appellant an additional award pertaining to her right lower extremity.

[4] The Office medical adviser characterized the most recent impairment as "now (16 + 7)" for 22 percent impairment of the left leg.

On November 6, 2006 appellant requested review by the Board. On May 21, 2007 the Board issued an order remanding case directing the Office to consolidate appellant's claims.[5]

On December 11, 2007 appellant filed a claim for an additional schedule award. In an October 26, 2007 report, Dr. Weldon advised that appellant had 14 percent whole person impairment as a result of his left knee internal derangement under Table 17-10, page 537.

In a February 27, 2008 report, Dr. Ronald Blum, an Office medical adviser, reviewed Dr. Weldon's report. Utilizing Table 17-10, page 537, he concluded that appellant had a 35 percent left lower extremity impairment based on his severe left knee flexion impairment of 54 degrees flexion.

On March 17, 2008 Dr. H. Mobley, an Office medical adviser, reviewed the medical evidence. He concurred with the impairment rating under Table 17-10 by Dr. Blum, which represented 35 percent loss to the left knee based on severe loss of flexion. To this, Dr. Mobley combined the prior 11 percent impairment awarded in 2000 for spinal nerve root motor and sensory loss. He found a total 42 percent impairment to the left leg. However, Dr. Mobley did not address whether these impairments could be combined under Table 17-2, the cross-usage chart. Moreover, he erroneously stated that the total of the prior schedule awards for the left leg was 22 percent, as referenced in his October 2006 report. The difference of 20 percent was the amount the medical adviser said was due appellant in an additional schedule award.

On April 7, 2008 the Office requested further clarification of the impairment rating in light of the prior schedule awards. On April 30, 2008 Dr. Mobley revised his March 2008 impairment rating. He reviewed the prior three awards totaling 37 percent: 10 percent in 1995 based on L5 sensory and motor loss; 11 percent in 2000 based on L5 deficits; and 16 percent based on the diagnosed-based impairment estimates. Dr. Mobley noted that he was not aware of the total when rendering his March, 2008 estimate. He stated:

> "The 10 percent and 11 percent awards are duplicative so that there is an excess 10 percent LLE [left lower extremity] impairment. His combined impairment should be (pg 406 - 16 percent and 11 percent is 25 percent) 25 percent LLE consisting of 11 percent for L5 deficits and 16 percent for D-bE (meniscectomies and patellar subluxation). The total combined (pg 604) LLE impairment should now be (35 percent and 11 percent is 42 percent) 42 percent LLE and consists of 35 percent for ROM [range of motion] deficits and 11 percent for spinal nerve root deficits. I suspect that a large amount of this has been paid (10 percent Dr. Meador -- [December] 31, [19]95, 11 percent Dr. Mobley -- [May] 3, [20]00, and 16 percent Dr. Meador [March] 25, [20]05 for total = 37 percent LLE) so that the claimant is due (42 percent - 37 percent = 5 percent) an additional schedule award of 5 percent LLE."

[5] Docket No. 07-370 (issued May 21, 2007). In a March 19, 2007 decision, an Office hearing representative affirmed a schedule award pertaining to appellant's right leg impairment. On return of the record, the Office was directed to address the issue of appellant's pay rate.

By decision dated June 9, 2008, the Office granted appellant a schedule award for an additional impairment of his left leg. It stated:

> "Degree and Nature of Permanent Impairment: 13 percent [l]eft [l]ower [e]xtremity (April 20, 2008 report DMA [district medical adviser] awarded an additional 5 percent for the [l]eft [l]ower [e]xtremity. You were previously awarded 16 percent Left Lower Extremity in the DMA's report of March 25, 2005, which the Office never paid to you, and 1 percent additional impairment of the right lower extremity. The Office erred and paid you [nine] percent right lower extremity impairment in a decision dated April 8, 2005. To avoid an overpayment, per the claimant's request, the Office deducted 8 percent from this award and paid the claimant 13 percent LLE instead of 21 percent (16 percent LLE + 5 percent LLE)."

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[6] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A., *Guides*.[7] 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.[8]

ANALYSIS

The Board finds that the case is not in posture for decision.

The record establishes that appellant was granted schedule awards for impairment to his left leg in 1996 (10 percent); 2000 (11 percent) and 2005 (16 percent), or 37 percent. The schedule award on appeal granted an additional 13 percent impairment, a total now of 50 percent loss of use to his left leg. While the Office claims examiner indicated that the most recent award was made in a manner to avoid an overpayment, the Board fears it may have actually been compounded. It is not readily apparent on appeal that the Office failed to pay the 2005 award, as is stated in the June 9, 2008 decision. Rather, the Office's April 11, 2005 letter to appellant explained that compensation was paid based on the 16 percent impairment rating under Table 17-33, the diagnosis-based estimate addressed by Dr. Weldon in 2004, with the other one percent attributable to his right leg impairment. At times, it issued schedule awards for impairment to both the left and right leg under one compensation order; thereby increasing the likelihood that the distinct impairment values relevant to each leg were intertwined. This is best exemplified by

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

[8] *Richard B. Myles*, 54 ECAB 379 (2003).

almost unintelligible finding of the June 9, 2008 decision. As compensation under a schedule award is made in terms of weeks of compensation, a maximum of 288 weeks for total loss of a leg, the better practice is to keep the number of weeks awarded for loss to each extremity separate, not combined.[9]

In rating impairment to the in this case, the Office medical adviser did not take into consideration the cross-usage chart at Table 17-2.[10] It provides that where there are multiple methods for rating impairment, it is the responsibility of the physician to explain which method should be used. The Board has noted that, in general, the method which allows the most clinically accurate impairment rating should be made.[11] The Office medical adviser, on multiple occasions, has combined the diagnosis-based impairment estimate first made in 2004 with impairment for L5 sensory and motor loss and, most recently, a loss of range of motion estimate under Table 17-10. But Table 17-2 provides that diagnosis-based impairment estimates cannot be combined with lower extremity impairment based on loss of muscle strength or range of motion.[12] Pain or sensory loss, however, is not precluded from consideration. Therefore, if the diagnosis-based impairment estimate of 2004 stands, the L5 motor impairment value may have to be excluded from consideration together with the 35 percent impairment estimate obtained under Table 17-10, as it is a range of motion impairment. If the 35 percent impairment estimate is the most accurate rating, then Table 17-2 provides that loss of strength and diagnosis-based methods are to be excluded. The medical evidence requires further development to determine what methods of rating impairment may be combined in consideration of appellant's left lower extremity and which of the possible combinations allowed is the most clinically accurate description. Following such development as the Office deems necessary, it should issue an appropriate decision on appellant's claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

[9] *See Shalanya Ellison*, 56 ECAB 150 (2004).

[10] *See Juanita L. Spencer*, 56 ECAB 611 (2005).

[11] *See Tara L. Hein*, 56 ECAB 431 (2005).

[12] *See Derrick C. Miller*, 54 ECAB 266 (2002).

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2008 decision of the Office of Workers' Compensation Programs dated June 9, 2008 be set aside. The case is remanded to the Office for further action in conformance with this decision.

Issued: September 24, 2009
Washington, DC

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

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

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