United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 09-2064**
	)	**Issued: August 3, 2010**
DEPARTMENT OF THE ARMY, ILLINOIS ARMY NATIONAL GUARD, Springfield, IL, Employer	)	

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 10, 2009 appellant filed a timely appeal from the July 22, 2009 merit decision of the Office of Workers' Compensation Programs concerning his entitlement to schedule award compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a 40 percent permanent impairment of his left leg, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that on May 12, 2003 appellant, then a 55-year-old administrative officer, sustained a left knee sprain, partial tear of the anterior cruciate ligament (ACL) of his left knee and medial meniscus tear due to a fall at work. On July 14, 2003 appellant underwent a

partial medial meniscectomy and partial lateral meniscectomy.[1] The procedures were authorized by the Office and he received compensation for periods of disability. On July 9, 2004 appellant filed a claim for a schedule award due to his May 12, 2003 work injury.

In a January 13, 2006 report, Dr. Aaron G. Humphreys, an attending Board-certified orthopedic surgeon, determined that appellant reached maximum medical improvement on January 3, 2006. On January 26, 2006 he concluded that appellant had a 41 percent permanent impairment of his left leg. With respect to the "anatomic classification," appellant had a 33 percent impairment of his left leg comprised of a 13 percent impairment due to a three centimeter left calf atrophy[2] and a 20 percent impairment due to left knee arthritic changes seen on radiographic testing. Dr. Humphreys did not find reflex sympathy dystrophy, vascular injury or peripheral nerve injury. With respect to the "functional evaluation," appellant had a 47 percent impairment of his left leg comprised of a 10 percent impairment due to missing 30 degrees of flexion motion in his left knee, a 20 percent impairment due to moderate flexion contracture of his left knee of 10 degrees, and a 17 percent impairment due to Grade IV strength upon plantar flexion of his left foot. Dr. Humphreys found that with respect to the "diagnostic evaluation" appellant had a 45 percent impairment of his left leg comprised of a 25 percent rating due to ACL laxity and a 20 percent rating due to osteoarthritis. He concluded that, when one averages appellant's "anatomic" impairment of 33 percent, his "functional" impairment of 47 percent and his "diagnostic" impairment of 45 percent, appellant "ends up with a lower extremity impairment of 41 percent."

On May 15, 2006 Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an Office medical adviser, reviewed the medical evidence of record, including the report of Dr. Humphreys. He found that appellant reached maximum medical improvement on July 14, 2004. Dr. Garelick indicated that appellant had a relatively severe ACL laxity which equaled a 25 percent impairment of his left leg under Table 17-33 on page 546 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He noted that physical examination demonstrated a three centimeter atrophy of appellant's left calf when compared to the normal right calf and that flexion of the left knee was to 100 degrees. According to Table 17-2 on page 526 of the A.M.A., *Guides*, appellant was not entitled to an impairment rating for atrophy or diminished range of motion at the same time he received an impairment rating for ACL laxity. Dr. Garelick stated that x-rays revealed some degenerative arthritis of appellant's left knee, most markedly in the medial compartment (two millimeter interval), which equaled a 20 percent impairment of his left leg under Table 17-31 on page 544. He concluded that appellant had a 40 percent permanent impairment of his left leg.[3]

[1] Appellant returned to limited-duty work for the employing establishment on July 22, 2003.

[2] The circumference of appellant's right calf was 45 centimeters and the circumference of his left calf was 42 centimeters.

[3] It appears that Dr. Garelick used the Combined Values Chart on page 604 of the A.M.A., *Guides* to combine the 25 and 20 percent impairment ratings and find a total left leg impairment of 40 percent.

In October 2006 appellant began working in the limited-duty position of support services assistant with the Illinois Army National Guard.[4] In a December 15, 2006 decision, the Office adjusted his compensation based on his ability to earn actual wages as support services assistant.

In a September 21, 2007 decision, the Office granted appellant a schedule award for a 40 percent permanent impairment of his left leg. The award ran for 115.2 weeks from July 14, 2004 to September 28, 2006 and totaled $48,646.82.[5] The Office advised that compensation for disability and a schedule award may not be paid concurrently. It deducted the amount of compensation paid for loss of drill pay from June 1 to October 15, 2005 ($2,112.97) from the amount of the schedule award for this period ($16,129.01).

In a December 26, 2007 decision, an Office hearing representative vacated the September 21, 2007 decision and remanded the case for further development of the medical evidence. He found a conflict in the medical evidence between Dr. Humphreys and Dr. Garelick regarding the extent of impairment to appellant's left leg.

On remand, the Office referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding the extent of his left leg impairment.

On April 14, 2008 Dr. Weiss reviewed the medical evidence of file, including January 2006 left knee x-rays, and reported the findings of his examination. He advised that appellant reached maximum medical improvement as of July 22, 2003 when he was released to return to work. Dr. Weiss did not see any real change in appellant's status since that time. On physical examination, there was evidence of restricted motion, slight valgus and anterior/posterior instability and patellofemoral and posteromedial joint line tenderness. These findings were consistent with appellant's symptoms, including left knee swelling and increased pain upon stair climbing, kneeling, squatting, twisting and prolonged sitting and walking. Dr. Weiss found that appellant had 20 percent impairment due to left knee arthritis (two millimeter joint space) under Table 17-31 on page 544 of the A.M.A., *Guides.* He also had 10 percent impairment due to left medial and lateral meniscectomies and 7 percent impairment due to left ACL laxity, both being diagnosis-based impairments derived from Table 17-33 on page 546. Dr. Weiss used the Combined Values Chart on page 604 to combine the 20, 10 and 7 percent impairment ratings and concluded that appellant had a 33 percent permanent impairment of his left leg.

In an April 21, 2008 decision, the Office determined that appellant did not establish that he had more than the 40 percent impairment of his left leg, for which he received a schedule

[4] Appellant had been terminated in 2005 for the inability to carry out the physical requirements of his job, but was reinstated after he began working as a support services assistant.

[5] The schedule award payment for July 14, 2004 to May 31, 2005 was based on the pay rate in effect on July 14, 2004 ($1,005.16 per week) and appellant received $34,630.78 in compensation for this period. The payment for June 1 to October 15, 2005 was based on the pay rate in effect on June 1, 2005 ($1,105.70 per week) and he received $14,016.04 in compensation for this period.

award. It found that the weight of the medical evidence rested with Dr. Weiss, who determined that appellant had a 33 percent permanent impairment of his left leg.

On April 24, 2009 appellant requested reconsideration of his claim. He argued that he was entitled to receive total disability compensation during the period that he received schedule award compensation. Appellant stated, "I had not been informed that the time I was receiving loss of wages could or would be converted to a schedule award for permanent loss of function to my knee. I believe that the period of schedule award should be recalculated in terms of a payment date to a time I was not receiving compensation for loss of wages."

In a July 22, 2009 decision, the Office affirmed the April 21, 2008 decision finding that the weight of the medical evidence regarding appellant's impairment was the opinion of the Dr. Weiss. It noted that appellant could not receive total disability for wage loss and schedule award compensation at the same time.

LEGAL PRECEDENT

The schedule award provision of the Act[6] and its implementing regulations[7] 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 regulations as the appropriate standard for evaluating schedule losses.[8]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[10] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

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[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404 (1999).

[8] *Id*.

[9] 5 U.S.C. § 8123(a).

[10] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[11] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

The Board notes that it is well settled that a claimant is not entitled to dual workers' compensation benefits for the same injury. A claimant may not receive compensation for temporary total disability and under a schedule award covering the same period of time.[12] As Larson points out, generally "the schedule award is added to the allowance for temporary total disability."[13] However, he makes clear that both benefits are not to be paid concurrently. In comparing schedule benefits with other benefits provided under workers' compensation laws for an injury, he notes, "It goes without saying that, when the statute provides parallel remedies for the same injury, it is not intended that claimant should have both."[14] With respect to the Act, the Board has held that "An employee cannot concurrently receive compensation under a schedule award and compensation for disability for work."[15]

ANALYSIS

The Office accepted that on May 12, 2003 appellant sustained a left knee sprain, partial tear of the ACL and a torn medial meniscus due to a fall at work. On July 14, 2003 appellant underwent a partial medial meniscectomy and partial lateral meniscectomy of his left knee. On September 21, 2008 the Office granted appellant a schedule award for a 40 percent impairment of his left leg. It later denied appellant's claim for a greater impairment to his leg. The Office found that the opinion of Dr. Weiss, a Board-certified orthopedic surgeon, did not establish that he had more than a 40 percent impairment to his left leg.

In March 2008, the Office had referred appellant to Dr. Weiss for an examination and an opinion regarding the extent of appellant's left leg impairment. It referred him to Dr. Weiss for an impartial medical examination, but Dr. Weiss actually served as an Office referral physician rather than as an impartial medical specialist because there was no conflict in the medical evidence at the time of the referral.[16]

The Office determined that there was a conflict in the medical evidence between Dr. Humphreys, an attending Board-certified orthopedic surgeon, and Dr. Garelick, a Board-certified orthopedic surgeon serving as an Office medical adviser, regarding the extent of the permanent impairment.[17] There was no conflict because Dr. Humphreys' impairment rating was not made in accordance with the standards of the A.M.A., *Guides*.[18]

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[12] *Robert T. Leonard,* 34 ECAB 1687, 1690 (1983); *Marie J. Born,* 27 ECAB 623, 628 (1976).

[13] A. Larson, *The Law of Workers' Compensation* § 58.15.

[14] *Id.* at § 58.25, n.42.

[15] *Andrew B. Poe,* 27 ECAB 510, 512 (1976).

[16] *See supra* notes 9 through 11.

[17] In a January 26, 2006 report, Dr. Humphreys determined that appellant had a 41 percent permanent impairment of his left leg. In a May 15, 2006 report, Dr. Garelick determined that appellant had a 40 percent impairment of his left leg.

[18] Dr. Humphreys indicated that he averaged the impairment ratings for his anatomic, functional and diagnostic evaluations. The A.M.A., *Guides* does not provide for such an impairment evaluation method.

On April 14, 2008 Dr. Weiss reviewed the medical evidence of file, including left knee x-rays and reported the findings of his examination. He noted that appellant's physical examination findings showed evidence of restricted motion, slight valgus and anterior/posterior instability and patellofemoral and posteromedial joint line tenderness. Dr. Weiss found that appellant had 20 percent impairment due to left knee arthritis (two-millimeter joint space) under Table 17-31 on page 544 of the A.M.A., *Guides.* He also had 10 percent impairment due to left medial and lateral meniscectomies and 7 percent impairment due to left ACL laxity, both being diagnosis-based impairments derived from Table 17-33 on page 546.[19] Dr. Weiss used the Combined Values Chart on page 604 to combine the 20, 10 and 7 percent impairment ratings and concluded that appellant had a 33 percent permanent impairment of his left leg.

The Board notes that the impairment rating of Dr. Weiss was derived in accordance with the relevant standards of the A.M.A., *Guides*. Dr. Weiss found that appellant had a 33 percent permanent impairment of his left leg. This does not establish that appellant is entitled to receive an additional schedule award as he was previously compensated for 40 percent impairment. There is no probative medical evidence of record to establish that he has more than a 40 percent impairment of his left leg. The Office properly denied appellant's claim for additional schedule award compensation.[20]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 40 percent permanent impairment of his left leg, for which he received a schedule award.

[19] It is permissible to combine impairment ratings for knee arthritis with diagnosis-based impairment ratings of the knee. *See* A.M.A., *Guides* 526, Table 17-2. Dr. Weiss provided an opinion that the diagnosed-based ratings for meniscectomy surgery and ACL laxity were not duplicative.

[20] Appellant contended that he was entitled to receive total disability compensation during the period that he received schedule award compensation. It is well settled that a claimant is not entitled to dual workers' compensation benefits for the same injury and may not receive compensation for temporary total disability and under a schedule award covering the same period of time. *See supra* notes 12 through 15.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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