United States Department of Labor
Employees' Compensation Appeals Board

W.V., Appellant	)	
and	)	**Docket No. 09-1165**
	)	**Issued: February 16, 2010**
DEPARTMENT OF THE ARMY,	)	
Fort Carson, CO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 31, 2009 appellant, through his representative, filed a timely appeal from the August 12, 2008 and February 20, 2009 merit decisions of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than 10 percent permanent impairment to his right lower extremity.

FACTUAL HISTORY

On September 13, 2004 appellant, then a 37-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that, on September 9, 2004, while making a routine traffic stop, he stepped out of his vehicle onto the side of the road and experienced a pop in his right knee. The Office accepted the claim for torn meniscus of the right knee and permanent aggravation of a preexisting torn anterior cruciate ligament (ACL) graft. It authorized a right knee arthroscopy, partial synovectomy and partial medial meniscectomy, which appellant underwent on November 30, 2004. On February 9, 2007 appellant underwent a revision of the

ACL reconstruction and a partial lateral meniscectomy. On June 21, 2007 he filed a request for a schedule award (Form CA-7).

By letter dated June 21, 2007, the Office requested that appellant submit a physician's evaluation of permanent impairment in accordance with the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[1]

In a July 24, 2007 medical report, Dr. Jacob Patterson, a Board-certified orthopedic surgeon, opined that appellant sustained 20 percent permanent impairment of the lower extremity under the A.M.A., *Guides* third edition.

In a letter dated September 21, 2007, the Office notified appellant that Dr. Patterson's impairment rating was based on the third edition of the A.M.A., *Guides* and that a rating conforming to the fifth edition was required.

In a November 12, 2007 medical report, Dr. Patterson opined that appellant sustained 15 percent permanent impairment of the right leg. He indicated that appellant did not sustain any impairment for range of motion or ankylosis, but provided a seven percent impairment rating for ACL laxity and two percent impairment for a lateral meniscectomy using Table 17-33. Dr. Patterson also added seven percent impairment for degenerative joint disease using Table 17-31. He stated that appellant had reached maximum medical improvement.

On February 14, 2008 the Office requested that an Office medical adviser review Dr. Patterson's medical reports and determine appellant's permanent impairment of the right lower extremity. In a February 15, 2008 medical report, Dr. Ronald J. Swarsen, Board-certified in family medicine, stated that Dr. Patterson did not provide a narrative explaining his impairment calculations or the methods he used to calculate impairment. He noted that degenerative joint disease was not an accepted condition. Dr. Swarsen advised that appellant reached maximum medical improvement on July 24, 2007.

On February 19, 2008 the Office notified Dr. Patterson of the deficiencies in his medical report and requested clarification of the impairment rating.

In a March 24, 2008 medical report, Dr. Patterson stated that, at the time of the ACL reconstruction, appellant had degenerative arthritis related to his employment injury based on direct vision during the arthroscopy and from an x-ray evaluation. Using Tables 17-31 and 17-33 in the A.M.A., *Guides*, he opined that appellant sustained seven percent lower extremity impairment due to mild arthritis in the knee, two percent impairment due to the partial lateral meniscectomy and seven percent impairment due to mild residue and ACL laxity. Dr. Patterson stated that appellant sustained 16 percent total permanent impairment of the lower extremity.

In an April 4, 2008 medical report, Dr. Swarsen opined that appellant sustained nine percent impairment to the right lower extremity. He stated that in accordance with Table 17-33 on page 546 of the A.M.A., *Guides*, appellant sustained seven percent impairment due to laxity of the ACL and two percent impairment for the partial lateral meniscectomy. Dr. Swarsen disagreed with Dr. Patterson's inclusion of an impairment rating for degenerative joint disease because he did not include x-rays to support the finding of arthritis as required by section 17.2h

[1] A.M.A., *Guides* (5th ed. 2001).

on page 544 of the A.M.A., *Guides*. He noted a maximum medical improvement date of July 24, 2007.

The Office referred appellant to Dr. Katharine J. Leppard, Board-certified in physical medicine and rehabilitation, for a second opinion evaluation of his permanent impairment. In a June 13, 2008 medical report, Dr. Leppard reviewed appellant's medical and occupational history and reported his complaints of persistent knee pain, numbness and weakness in the right knee. Physical examination revealed mild swelling of the right knee, mild ACL laxity on the right and decreased sensation over the saphenous nerve distribution. Range of motion of the knee demonstrated extension and flexion of 97 degrees. Dr. Leppard opined that appellant sustained 18 percent permanent impairment of the right lower extremity. She added 2 percent impairment for a partial lateral meniscectomy and 7 percent impairment for mild cruciate ligament laxity, in accordance with Table 17-33 on page 546, with 10 percent impairment for mild loss of range of motion with flexion less than 110 degrees, using Table 17-10 on page 537. Dr. Leppard noted that appellant achieved maximum medical improvement on November 12, 2007.

In a June 27, 2008 medical report, Dr. Swarsen stated that Dr. Leppard appropriately used Table 17-33 on page 546 of the A.M.A., *Guides* to determine that appellant sustained seven percent impairment for a laxity of the ACL and two percent impairment for a partial lateral medial meniscectomy. In light of Table 17-2 on page 526 of the A.M.A., *Guides*, however, Dr. Leppard incorrectly combined the rating for loss of range of motion with the diagnosis-based estimates. Dr. Swarsen opined that the 10 percent impairment rating for range of motion should be adopted because it provided the highest rating. He indicated that appellant reached maximum medical improvement on July 24, 2007.

By letter dated June 30, 2008, the Office requested that Dr. Leppard clarify her impairment after reviewing Dr. Swarsen's June 27, 2008 medical report.

In a July 3, 2008 report, Dr. Leppard stated that she would adopt the higher 10 percent impairment rating for loss of range of motion over the 9 percent rating for partial meniscectomy and mild ACL laxity.

On July 18, 2008 Dr. Swarsen agreed with Dr. Leppard's rating of 10 percent permanent impairment of the right leg. He stated that the rating was appropriate and consistent with the fifth edition of the A.M.A., *Guides* and supported by documentation of pathology.

By decision dated August 12, 2008, the Office granted appellant a schedule award for 10 percent impairment of the right leg, less the nine percent previously paid under a separate claim number.[2] It found maximum medical improvement was on July 24, 2007.

On August 22, 2008 appellant, through his attorney, filed a request for a telephonic hearing before an Office hearing representative, which was held on December 4, 2008.

By decision dated February 20, 2009, the Office hearing representative affirmed the August 12, 2008 decision. She found that Dr. Patterson did not provide a valid impairment

[2] Appellant was awarded a schedule award for a nine percent permanent impairment to the right lower extremity due to a July 11, 2000 knee strain under Office file number xxxxxx039.

rating; therefore, the Office properly referred appellant to Dr. Leppard for a second opinion evaluation. Further, Dr. Swarsen and Dr. Leppard agreed that appellant sustained 10 percent permanent impairment.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] set forth the number of weeks of compensation payable to employees sustaining 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.[5]

ANALYSIS

The Office accepted that appellant sustained a torn meniscus of the right knee and a permanent aggravation of a preexisting torn ACL due to his employment injury. The issue is whether appellant sustained greater than 10 percent permanent impairment to his right lower extremity entitling him to additional schedule awards.

In a July 24, 2007 medical report, Dr. Patterson opined that appellant sustained 20 percent permanent impairment. He utilized the third edition of the A.M.A., *Guides*. After notification that impairment ratings were required to be under the fifth edition of the A.M.A., *Guides*, Dr. Patterson provided a November 12, 2007 report finding 15 percent permanent impairment of the right leg. He provided seven percent impairment rating for mild cruciate ligament laxity and two percent impairment for a lateral meniscectomy using Table 17-33.[6] Dr. Patterson also added seven percent impairment for degenerative joint disease using Table 17-31.[7]

On March 24, 2008 Dr. Patterson found that appellant sustained 16 percent permanent impairment of the right lower extremity. He added seven percent impairment for mild arthritis of the knee, two percent impairment for partial lateral meniscectomy and seven percent impairment for mild residue and ACL laxity using Tables 17-31[8] and 17-33[9] in the A.M.A., *Guides*, fifth edition. Dr. Patterson stated that appellant's degenerative arthritis was related to his employment injury and was visible during the arthroscopy and on an x-ray evaluation.

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

[5] *Id*. *See also Linda R. Sherman*, 56 ECAB 127 (2004).

[6] A.M.A., *Guides* 546.

[7] *Id*. at 544.

[8] *Id*. at 544.

[9] *Id*. at 546.

The Board finds that Dr. Patterson's impairment ratings are not sufficient for schedule award purposes. In the July 24, 2007 medical report, Dr. Patterson based his impairment rating on the third edition of the A.M.A., *Guides* as opposed to the fifth edition. This report is of diminished probative value.[10] On November 12, 2007 and March 24, 2008 Dr. Patterson included an impairment rating for degenerative joint disease using Table 17-31. He stated that he visually observed the arthritis during the arthroscopy and that it was visible on an x-ray film. The A.M.A., *Guides* state that in the case of arthritis of the knee, impairments should be based on x-rays where the knee is in the neutral flexion-extension position or zero degrees.[11] Dr. Patterson did not specify the type of x-ray he relied upon in rating this impairment or include a copy of the x-ray with his medical report.[12] The Board finds that the impairment ratings were not in conformance with the A.M.A., *Guides* and are of diminished probative value.[13]

The Office referred appellant to Dr. Leppard for a second opinion evaluation. In a June 13, 2008 medical report, Dr. Leppard reviewed appellant's medical and occupational history and provided a complete physical examination. She opined that appellant sustained 18 percent impairment of the right lower extremity. Dr. Leppard added two percent impairment for a partial lateral meniscectomy and seven percent impairment for mild cruciate ligament laxity, using Table 17-33 on page 546 of the A.M.A., *Guides*.[14] She also added 10 percent impairment for mild loss range of motion with flexion less than 110 degrees, in accordance with Table 17-10 on page 537.[15]

The Office properly routed the case file to the Office medical adviser for review.[16] On June 27, 2008 Dr. Swarsen opined that appellant sustained 10 percent impairment rating for loss of range of motion according to Table 17-10.[17] He found that Dr. Leppard incorrectly combined the ratings for loss of range of motion with the diagnosis-based ratings, which was prohibited under the cross-usage chart at Table 17-2, page 526.[18] As the rating for loss of range of motion was higher than that for the diagnosis-based rating, Dr. Swarsen found that appellant's total impairment rating was 10 percent.

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[10] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the guidelines for rating permanent impairment. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

[11] A.M.A., *Guides* 544.

[12] *See R.D.*, Docket No. 08-2091 (issued August 6, 2009).

[13] *See J.C.*, 58 ECAB 700 (2007).

[14] A.M.A., *Guides* 546.

[15] *Id*. at 537.

[16] *See* Federal (FECA) Procedure Manual, *supra* note 10 (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[17] A.M.A., *Guides* 537.

[18] *Id*. at 526.

The Office requested that Dr. Leppard clarify her impairment rating and provide a copy of Dr. Swarsen's report. On July 3, 2008 Dr. Leppard advised that she would adopt the 10 percent impairment rating for range of motion as it was greater than the diagnosis-based estimates of 9 percent. The A.M.A., *Guides* provides that, if more than one rating method can be used, the method that provides the higher rating should be adopted.[19] As the rating for loss of range of motion provided a higher total impairment, the medical evidence establishes 10 percent impairment to appellant's right leg. There is no other probative medical evidence of record to establish that appellant had more than 10 percent impairment of his right lower extremity.

CONCLUSION

The Board finds that appellant has 10 percent permanent impairment to his right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2009 and August 12, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 16, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[19] *Id.* at 527.