

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 09-1424
Issued: February 19, 2010**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2009 appellant filed a timely appeal of the September 10, 2008 and May 1, 2009 merit decisions of the Office of Workers' Compensation Programs, which denied an additional schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has greater than 50 percent impairment of the left lower extremity.

FACTUAL HISTORY

On September 18, 1998 appellant, then a 51-year-old letter carrier, injured his left knee and lower back when he fell while climbing stairs delivering mail. The Office initially accepted

the claim for left knee sprain and lumbar sprain. The claim was later expanded to include torn left meniscus and the Office authorized surgery, which appellant underwent on March 16, 1999.¹

On September 29, 1999 the Office granted a schedule award for nine percent impairment of the left lower extremity.² In September 2000 it expanded appellant's claim to include traumatic osteoarthritis of the left knee.³ The Office also granted an additional schedule award on October 31, 2000 for 20 percent impairment of the left lower extremity. Although appellant's overall impairment at the time was 29 percent, the Office reduced the October 31, 2000 award to reflect the previous award of 9 percent.⁴

In a report dated December 19, 2001, appellant's treating physician, Dr. Stulberg, found 50 percent impairment due to arthritis. On January 16, 2002 the district medical adviser (DMA) concurred with Dr. Stulberg's 50 percent left lower extremity impairment rating.

By decision dated February 6, 2002, the Office awarded appellant an additional 30 percent impairment for the left lower extremity. The award took into account appellant's October 31, 2000 award for 20 percent, but it did not account for appellant's September 29, 1999 award for 9 percent impairment of the left lower extremity. Thus, between September 1999 and February 2002, the Office granted three schedule awards for a combined 59 percent impairment of the left lower extremity.

Appellant filed a claim (Form CA-7) for an additional schedule award on September 24, 2003. In a decision dated December 8, 2003, the Office denied an additional award because the evidence demonstrated only a 22 percent impairment of the left lower extremity.⁵

On June 12, 2007 Dr. Stulberg performed a left knee total arthroplasty, which the Office authorized. In a report dated December 21, 2007, he stated that he anticipated a full recovery and that appellant was likely to reach maximum medical improvement 12 months post surgery; approximately June 2008.

Appellant filed additional claims for a schedule award on June 5 and 12, 2008. In a report dated June 5, 2008, Dr. Stulberg indicated that appellant had reached maximum medical improvement. By letter dated June 18, 2008, the Office wrote to Dr. Stulberg requesting that he

¹ The arthroscopic surgery was performed by Dr. Bernard N. Stulberg, a Board-certified orthopedic surgeon.

² The overall rating included components for mild cruciate ligament laxity (seven percent) and appellant's March 16, 1999 partial meniscectomy (two percent).

³ In July 2003, the Office further expanded the claim to include aggravation/acceleration of left knee osteoarthritis.

⁴ The 29 percent rating included a combination of impairments for appellant's partial meniscectomy (2 percent) and arthritis in the knee joint (20 percent) and patellofemoral joint (10 percent).

⁵ In an October 29, 2003 report, Dr. Stulberg found 20 percent impairment based on arthritis. On November 20, 2003 the DMA found an overall impairment of 22 percent based on left knee arthritis (20 percent) and appellant's partial meniscectomy (2 percent).

provide an impairment rating in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Thirty days was allotted for submission of the requested impairment rating.

The Office did not receive the requested impairment rating. Consequently, by decision dated September 10, 2008, it denied appellant's claim for an additional schedule award.

Appellant requested a hearing, which was held on February 17, 2009. His counsel submitted a September 12, 2008 impairment rating from Dr. Timothy Morley, who found 21 percent impairment of the left lower extremity. Dr. Morley's rating was based on a combination of impairments for loss of motion (12 percent) and muscle weakness (12 percent). At the hearing, counsel acknowledged that the latest impairment rating was considerably less than what had previously been awarded. He advised the hearing representative that he was attempting to obtain another report from Dr. Morley. The hearing representative agreed to keep the record open for 30 days post hearing. She later granted counsel a 45-day extension to submit additional evidence. However, the Office did not receive any additional evidence within the allotted time frame.

In a decision dated May 1, 2009, the hearing representative found that appellant was not entitled to a schedule award in excess of the 50 percent left lower extremity impairment previously granted. Accordingly, she affirmed the Office's September 10, 2008 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.⁶ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the appropriate standard for evaluating schedule losses.⁷ Effective February 1, 2001, schedule awards are determined in accordance with the A.M.A., *Guides* (5th ed. 2001).⁸

ANALYSIS

The Act and its implementing regulations provide for the reduction of compensation for subsequent injury to the same scheduled member.⁹ Benefits payable under 5 U.S.C. § 8107(c) shall be reduced by the period of compensation paid under the schedule for an earlier injury if:

⁶ For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2) (2006).

⁷ 20 C.F.R. § 10.404 (2009).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003).

⁹ 5 U.S.C. § 8108; *see* 20 C.F.R. § 10.404(c).

(1) compensation in both cases is for impairment of the same member or function or different parts of the same member or function; and (2) the latter impairment in whole or in part would duplicate the compensation payable for the preexisting impairment.¹⁰ Thus far, appellant has been paid the equivalent of 59 percent impairment of the left lower extremity based on medical evidence demonstrating a maximum impairment of 50 percent. The latest schedule award in February 2002 for an additional 30 percent impairment took into account appellant's October 31, 2000 award of 20 percent. However, appellant's September 29, 1999 award for 9 percent impairment of the left lower extremity was apparently overlooked.

Appellant currently seeks an additional schedule award in excess of the previously accumulated awards totaling 59 percent of the left lower extremity. In January 2002, the DMA concurred with Dr. Stulberg's December 19, 2001 arthritis-based impairment of 50 percent. This medical evidence formed the basis of the Office's February 6, 2002 award. Since that time appellant has undergone a left knee total arthroplasty in June 2007. His latest impairment rating dated September 12, 2008, found only 21 percent impairment of the left lower extremity. Dr. Morley's rating was based on a combination of impairments for loss of motion (12 percent) and muscle weakness (12 percent). At the February 17, 2009 hearing, appellant's counsel acknowledged that Dr. Morley's impairment rating was considerably less than the previous maximum rating of 50 percent.

The onus is not on the Office to develop appellant's schedule award claim.¹¹ The Office wrote to Dr. Stulberg on June 18, 2008 requesting that he provide an impairment rating under the A.M.A., *Guides* (5th ed. 2001). Dr. Stulberg did not comply. Appellant instead submitted Dr. Morely's September 12, 2008 impairment rating, which found only 21 percent impairment of the left lower extremity. On its face, this report does not demonstrate a greater impairment than previously awarded. Appellant's counsel acknowledged as much. The hearing representative afforded counsel approximately two and half months to submit additional medical evidence, but none was received. The Board finds that the medical evidence of record does not demonstrate left lower extremity impairment in excess of 50 percent. Accordingly, the Office properly denied appellant's claim for an additional schedule award.

CONCLUSION

Appellant has not established that he has greater than 50 percent impairment of the left lower extremity.

¹⁰ 20 C.F.R. § 10.404(c)(1), (2).

¹¹ An employee seeking benefits under the Act has the burden of proof to establish the essential elements of his claim. *Amelia S. Jefferson*, 57 ECAB 183, 187 (2005).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2009 and September 10, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 19, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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