

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

C.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Milwaukee, WI, Employer)

**Docket No. 09-1485
Issued: February 19, 2010**

Appearances:
Appellant, pro se
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 May 26, 2009 appellant filed a timely appeal from the March 26, 2009 schedule award decision of the Office of Workers' Compensation Programs. 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 eight percent permanent impairment of the left lower extremity.

FACTUAL HISTORY

This is the second appeal before the Board. In a February 5, 2009 decision, the Board affirmed as modified an Office decision dated June 12, 2008.¹ The Board noted that the medical adviser incorrectly calculated impairment for sensory deficit or pain in the distribution of the

¹ Docket No. 08-1825 (issued February 5, 2009).

femoral nerve and also impairment for arthritis cartilage interval.² The Board determined that in accordance with the fifth edition of the A.M.A., *Guides*,³ sensory deficit or pain in the distribution of the femoral nerve yielded one percent impairment⁴ and an arthritis cartilage interval of three millimeters based on x-ray yielded seven percent impairment of the leg.⁵ These ratings combined to total eight percent permanent impairment of the left lower extremity. The facts and circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.

In a decision dated March 26, 2009, the Office granted appellant a schedule award for eight percent permanent impairment of the left lower extremity. The period of the schedule award was from April 5 to September 14, 2006.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulations⁷ 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

ANALYSIS

On appeal, appellant believes that she is entitled to a greater impairment rating than the eight percent permanent impairment of the left lower extremity granted by the Office. She notes

² On April 8, 2008 appellant was treated by Dr. Flesch, who noted appellant's pain symptoms were controlled by medication but she still experienced episodes of swelling. He noted standing x-rays were obtained and the sunrise views revealed no narrowing of the patellofemoral space, the standing upright view demonstrated narrowing of the medial compartment of the left knee compared to the right, a small anterior osteophyte formation on the medial tibial plateau and the medial joint compartment measured three millimeters. Dr. Flesch noted that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) appellant had seven percent impairment of the left lower extremity and referenced Table 17-31, page 544. The Office medical adviser calculated four percent impairment for Grade 3 pain in the distribution of the femoral nerve to the left knee and three percent impairment for arthritis based on cartilage interval.

³ A.M.A., *Guides* (5th ed. 2001).

⁴ *Id.* at 482, 552, Table 16-10, 17-37.

⁵ *Id.* at 544, Figure 17-31.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *B.C.*, 58 ECAB 111 (2006).

that her accepted condition causes daily difficulties with such things as walking, climbing stairs and kneeling.⁹

In its February 5, 2009 decision, the Board found that the opinion of Dr. Flesch, appellant's attending physician, established one percent impairment for sensory deficit or pain in the distribution of the femoral nerve and seven percent impairment of the lower extremity for arthritis. This yielded total left leg impairment of eight percent. As the Office had only issued a schedule award for seven percent impairment of the left leg, the Board modified the Office's decision to reflect that appellant had eight percent left lower extremity impairment. This decision of the Board became final upon the expiration of 30 days from the date of its filing.¹⁰ In a decision dated March 26, 2009, the Office properly granted a schedule award for one percent left lower extremity impairment.¹¹ It considered no new evidence or argument in issuing its March 26, 2009 decision consistent with the Board's February 5, 2009 decision. The record does not establish that appellant submitted new medical evidence or argument prior to issuance of the Office's March 26, 2009 decision. Thus, the issue adjudicated in the Board's February 5, 2009 decision is *res judicata* and not subject to further consideration by the Board on this appeal.¹² Consequently, there is no basis for finding greater impairment. The Office's March 26, 2009 decision conforms to the Board's February 5, 2009 decision. There is no evidence left unreviewed before the Board.

CONCLUSION

The Board finds that appellant has no more than eight percent permanent impairment of the left lower extremity.¹³

⁹ As noted in the Board's February 5, 2009 decision, the amount payable for a schedule award does not take into account the effect the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities. *Supra* note 1.

¹⁰ *Thomas J. Engelhart*, 50 ECAB 319 (1999).

¹¹ 20 C.F.R. § 501.6(d).

¹² *W.B.*, Docket No. 06-1283 (issued April 5, 2007). See *Paul Raymond Kuyoth*, 27 ECAB 498, 503-04 (1976); *Anthony Greco*, 3 ECAB 84, 85 (1949) (the Board's determinations are binding upon the Office and must, of necessity, be so accepted and acted upon by the Director of the Office). See also *D.N.*, 59 ECAB __ (Docket No. 07-1940, issued June 17, 2008) (appellant contended that the Board should accept the impairment ratings provided by his treating physician; however, in a prior appeal, the Board considered the rating of the treating physician and its finding was *res judicata* absent any additional report from the physician).

¹³ With her request for an appeal, appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; see 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 19, 2010
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