

In a report dated August 2, 2007, Dr. Emmanuel Jacob, a physiatrist, provided a history and results on examination. He reported chronic bilateral knee pain and right knee weakness. With respect to permanent impairment, Dr. Jacob identified Tables 16-13 and 16-11 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition 2001) hereinafter referred to as the A.M.A., *Guides*) and stated, "Right knee extension (quadriceps) is 4/5, equivalent to 20 percent motor deficit and 35 percent maximum impairment = 7 percent impairment of the lower extremity." He also found two percent leg impairment for a partial meniscectomy under Table 17-35, and three percent leg impairment for pain under Chapter 18 of the A.M.A., *Guides*. Dr. Jacob concluded that appellant had a 12 percent right leg permanent impairment with a date of maximum medical improvement of July 16, 2003.

By report dated October 20, 2007, an Office medical adviser indicated that he disagreed with Dr. Jacob's assessment of motor deficit impairment. He stated that decreased strength cannot be rated in the presence of painful conditions that prevent application of maximal force. The medical adviser agreed that appellant had a two percent impairment for the meniscectomy and three percent for pain, for five percent leg impairment. He found the date of maximum medical improvement the date of Dr. Jacob's examination, August 2, 2007.

By decision dated November 8, 2007, the Office issued a schedule award for five percent right leg permanent impairment. The period of the award was 14.4 weeks commencing August 2, 2007. It further stated, "Your Payment and the Period Covered: \$8,326.00 August 2 to November 10, 2007 Less -- \$6,915.47 Third-Party Surplus = \$1,411.33." No further explanation was provided.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.¹ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.²

ANALYSIS

An attending physician, Dr. Jacob, opined that appellant had 12 percent right leg impairment. This opinion is of diminished probative value with respect to an impairment for motor deficit. The table identified by Dr. Jacob, Table 16-13, is a table for the upper extremity and requires the identification of a specific spinal nerve.³ A motor deficit impairment for the leg

¹ 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

² A. George Lampo, 45 ECAB 441 (1994).

³ A.M.A., *Guides* 489, Table 16-13.

would be based on Table 17-37, and requires the identification of the specific injured nerve and then proper application of Table 16-11 to grade the severity.⁴ Dr. Jacob did not properly apply the A.M.A., *Guides* and an impairment based on a motor deficit is not established by the medical evidence.

Both Dr. Jacob and the Office medical adviser found an impairment of two percent under Table 17-33, for a partial medial meniscectomy.⁵ In addition, both physicians found three percent impairment under Chapter 18. Dr. Jacob noted chronic pain and the A.M.A., *Guides* allows up to three percent for pain-related impairment if the impairment cannot be assessed by other methods.⁶ The Board finds that the weight of the medical evidence establishes five percent right leg permanent impairment.

The number of weeks of compensation for a schedule award is determined by the compensation schedule at 5 U.S.C. § 8107(c). For complete loss of use of the leg, the maximum number of weeks of compensation is 288 weeks. Since appellant's impairment was five percent, he is entitled to five percent of 288 weeks, or 14.40 weeks of compensation. It is well established that the period covered by a schedule award commences on the date that the employee reaches maximum medical improvement from residuals of the employment injury.⁷ In this case the Office medical adviser concluded that the date of maximum medical improvement was the date of examination by Dr. Jacob.

On appeal, appellant argues that appellant should receive an additional five percent, based on a footnote from Table 17-31. This table provides impairments based on cartilage intervals as determined by x-ray, and a footnote states that in an individual with a history of direct trauma, patellofemoral pain and crepitation but no joint space narrowing, five percent leg impairment is given.⁸ Dr. Jacob specifically considered Table 17-31 and opined that appellant did not have any impairment in this regard. This is a medical issue and there was no probative evidence indicating an impairment under Table 17-31 based on the medical evidence of record.

Appellant also raises the issue of an offset by the Office based on a third-party surplus. In the November 8, 2007 decision, the Office provided no findings or explanation regarding the offset. Appellant is entitled to a clear explanation of the Office's findings in this regard, including an explanation of the legal authority on which the Office relied to offset a schedule award by deducting a third-party recovery surplus.⁹ On return of the case record, the Office should issue a proper decision on the issue.

⁴ *Id.* at 550-52, Table 17-37.

⁵ *Id.* at 546, Table 17-33. This table provides diagnosis-based impairment percentages and a partial medial meniscectomy is two percent leg impairment.

⁶ *Id.* at 570-74.

⁷ *Albert Valverde*, 36 ECAB 233, 237 (1984).

⁸ A.M.A., *Guides* 544.

⁹ A final decision of the Office "shall contain findings of fact and a statement of reasons." 20 C.F.R. § 10.126.

CONCLUSION

The Board finds that the evidence does not establish more than five percent right leg permanent impairment. The case is remanded for a proper decision on a third-party surplus offset.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 8, 2007 is affirmed with respect to five percent right leg permanent impairment, and set aside and remanded on the issue of a third-party surplus offset.

Issued: January 27, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board