United States Department of Labor
Employees' Compensation Appeals Board

N.S., Appellant	)	
and	)	**Docket No. 09-1486**
	)	**Issued: May 20, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Providence, RI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 26, 2009 appellant filed a timely appeal from the July 7, 2008 and January 28, 2009 merit decisions of the Office of Workers' Compensation Programs concerning a schedule award. 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 24 percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that on May 6, 2004 appellant, then a 58-year-old distribution clerk, sustained a right knee meniscus tear, right hip contusion and lumbar disc displacement due to a fall at work. On December 17, 2004 Dr. Kevin N. Mabie, an attending Board-certified orthopedic surgeon, performed a partial medial meniscectomy and medial femoral chondroplasty

on appellant's right knee. The procedure was authorized by the Office. On March 1, 2006 appellant filed a claim for a schedule award due to his May 6, 2004 employment injury.

On March 23, 2006 Dr. Samuel J. Hess, an attending Board-certified orthopedic surgeon, stated that on examination appellant exhibited a left compensatory pelvic tilt of his right thoracic rib hump and significant quadriceps atrophy in his right leg. Appellant had 5/5 motor strength in his arms and left leg, 3/5 strength on hip flexion and 3/5 strength of his right leg quadriceps (but otherwise had 5/5 strength in his right leg). Dr. Hess indicated that sensation in the extremities was grossly intact but noted that appellant had diminished reflexes in his right leg compared with his left leg.[1]

The findings of January 9, 2007 electromyogram (EMG) and nerve conduction velocity (NCV) testing showed that appellant had a right L4 radiculopathy. On April 18, 2007 Dr. Mabie found that appellant continued to have symptoms of his medial meniscus tear and L4 radiculopathy with resultant weakness in his right knee. He noted that appellant was not interested in right knee surgery given that his knee symptoms were "not particularly bothersome." On May 17, 2007 Dr. Mabie stated that appellant complained of pain, weakness and giving way in his right knee. On examination he exhibited full range of motion of his right knee, atrophy of his right thigh and subjective weakness of his right quadriceps. Dr. Mabie indicated that appellant had a right L4 radiculopathy and a right medial meniscus tear which was asymptomatic and did not result in permanent impairment.[2]

On February 19, 2008 Dr. Mabie stated that appellant had reached maximal medical improvement as of April 18, 2007. He noted that under Table 17-31 of the A.M.A., *Guides* appellant had a three percent permanent impairment of his whole person due to the arthritic changes of his right knee which was equivalent to a seven percent impairment of his right leg. Under Table 17-33, Dr. Mabie had a two percent impairment of his right leg due to his right partial medial meniscectomy. He stated that under Table 15-3 appellant had a 13 percent impairment of his whole person due to persistent symptoms related to his L4 radiculopathy.[3] Dr. Mabie noted, "Combining these impairments, the patient has suffered a permanent partial impairment of function of his right lower extremity of 29 percent by using the appropriate conversion for combining lower extremity impairments."

On May 5, 2008 Dr. George L. Cohen, a Board-certified internist who served as an Office medical adviser, stated that under Table 17-33 of A.M.A., *Guides* appellant had a two percent impairment of his right leg due to his right partial medial meniscectomy.[4] Using Table

[1] The findings of magnetic resonance imaging (MRI) scan testing from August 2006 showed degenerative disc disease between L3-4 and L5-S1. X-ray testing from late 2006 showed mild osteoarthritis of the right knee including a three-millimeter joint space interval.

[2] Dr. Mabie stated that appellant had a 13 percent permanent impairment of his whole person based on Table 15-3 (regarding lumbar spine impairment) of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

[3] Dr. Mabie indicated that appellant had positive EMG findings for a right L4 radiculopathy, symptomatic sensory loss and symptomatic loss of strength.

[4] Dr. Cohen indicated that appellant had reached maximal medical improvement on April 18, 2007.

17-31, appellant had a seven percent impairment of his right leg due to arthritic loss of right knee joint cartilage (three-millimeter cartilage interval). Dr. Cohen used the Combined Values Chart of the A.M.A., *Guides* to find that appellant had a nine percent impairment of the right leg due to right knee impairment. Using Table 15-18, the maximum leg impairment due to sensory loss associated with the L4 nerve was 5 percent and the maximum leg impairment due to weakness associated with this nerve was 34 percent. Dr. Cohen indicated that under Table 16-10 appellant had a Grade 3 (60 percent) sensory loss because his condition interfered with some activity and he multiplied the 5 and 60 percent values to yield 3 percent leg impairment for sensory loss. Under Table 16-11, appellant had a Grade 3 (50 percent) strength loss associated with the L4 nerve and multiplying the 34 and 50 percent values yielded a 17 percent leg impairment for strength loss. Dr. Cohen used the Combined Values Chart to combine the 3 percent value for sensory with the 17 percent value for strength loss to yield a 19 percent impairment for sensory loss and strength loss associated with the right L4 nerve. He then used the Combined Values Chart to combine this 19 percent impairment with the 9 percent value for impairment associated with the right knee to conclude that appellant had a 24 percent permanent impairment of his right leg.

In a July 7, 2008 decision, the Office granted appellant a schedule award for a 24 percent permanent impairment of his right leg. The award ran for 69.12 weeks from April 18, 2007 to August 13, 2008.

Appellant requested a hearing before an Office hearing representative. At the November 10, 2008 hearing, he argued that Dr. Mabie's opinion showed that he had a 29 percent permanent impairment of his right leg. Appellant also questioned whether Dr. Cohen properly combined various impairment values to reach his conclusion on total impairment of his right leg.

In a January 28, 2009 decision, the Office hearing representative affirmed the July 7, 2008 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulations[6] 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.[7] A schedule award is not payable for the loss, or loss of use, of a part of the body that is not specifically enumerated under the Act. Neither the Act nor its implementing regulations provide for a schedule

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id*.

award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under the Act.[8]

ANALYSIS

The Office accepted that on May 6, 2004 appellant sustained a right knee meniscus tear, right hip contusion and lumbar disc displacement due to a fall at work. On December 17, 2004 appellant underwent a partial medial meniscectomy and medial femoral chondroplasty of his right leg. In a July 7, 2008 decision, the Office granted appellant a schedule award for a 24 percent permanent impairment of his right leg. The award was based on calculations of Dr. Cohen, a Board-certified internist serving as an Office medical adviser, who reviewed the medical evidence of record, including the reports of Dr. Mabie, an attending Board-certified orthopedic surgeon.

On May 5, 2008 Dr. Cohen properly determined that appellant had a two percent diagnosis-based impairment of his right leg due to his right partial medial meniscectomy surgery[9] and a seven percent impairment of his right leg due to arthritic loss of right knee joint cartilage (three-millimeter cartilage interval).[10] He also properly found that multiplying the 5 percent maximum value for sensory loss due to a peripheral injury of the L4 nerve times a Grade 3 (60 percent) sensory loss yielded a 3 percent right leg impairment for sensory loss.[11] Under the Combined Values Chart of the A.M.A., *Guides*, the combining of these three impairment values would yield a 12 percent impairment of the right leg.[12] Table 17-2 (Guide to the Appropriate Combination of Evaluation Methods) provides that it is permissible to combine these three impairment values, which represent diagnosis-based impairment due to knee surgery (two percent), impairment due to knee arthritis (seven percent) and impairment due to peripheral nerve injury associated with the L4 nerve (three percent).[13]

Dr. Cohen also multiplied the 34 percent maximum value for leg impairment due to muscle strength loss associated with the L4 nerve times a Grade 3 (50 percent) strength loss to total 17 percent impairment for strength loss.[14] However, he impermissibly combined this 17 percent impairment value for muscle strength loss with the ratings for diagnosis-based impairment due to knee surgery, impairment due to knee arthritis and impairment due to

[8] *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

[9] *See* A.M.A., *Guides* 546, Table 17-33.

[10] *Id.* at 544, Table 17-31.

[11] *Id.* at 424, Tables 15-15 and 15-18. Appellant's condition interfered with some activities and therefore it was appropriate to find a Grade 3 sensory loss. *Id.* at 424, Table 15-18.

[12] *Id.* at 604, Combined Values Chart.

[13] *Id.* at 526, Table 17-2.

[14] *Id.* at 424, Tables 15-16 and 15-18.

peripheral nerve injury associated with the L4 nerve. The Board notes that Table 17-2 of the A.M.A., *Guides* does not allow for such a combination of impairment ratings.[15]

On appeal, appellant argued that Dr. Mabie's opinion showed that he had a 29 percent permanent impairment of his right leg. On February 19, 2008 Dr. Mabie properly found that he had a two percent impairment of his right leg due to his right partial medical meniscectomy and a seven percent impairment of his right leg due to arthritic loss of right knee joint cartilage. Dr. Mabie also indicated that under Table 15-3 of the A.M.A., *Guides* appellant had a 13 percent impairment of his whole person due to persistent symptoms related to his L4 radiculopathy. Dr. Mabie stated, "Combining these impairments, the patient has suffered a permanent partial impairment of function of his right lower extremity of 29 percent by using the appropriate conversion for combining lower extremity impairments." However, Table 15-3 concerns diagnosis-related estimates for impairments related to lumbar spine injuries and provides impairment values for the whole person.[16] Dr. Mabie's evaluation in this regard is of limited probative value because the Act does not provide for a schedule award for impairment to the back or to the body as a whole.[17] His conclusion regarding appellant's total impairment is of reduced probative value in that he failed to provide a full explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board for evaluating schedule losses.[18]

The evidence of record reflects that impairment rating methods would yield either a 12 percent impairment (based on the combination of impairments due to surgery, arthritis and nerve-based sensory loss) or a 17 percent impairment (based on muscle strength loss). The A.M.A., *Guides* provides that, when two methods of impairment evaluation are appropriate, the method which yields the highest impairment rating should be used.[19] In this case, the highest impairment rating is derived by using the 17 percent impairment rating for muscle strength loss. The Board finds that the evidence of record shows that appellant has a 17 percent permanent impairment of his right leg. Therefore, appellant has not established that he has more than a 24 percent permanent impairment to his right leg, for which he received a schedule award.

[15] *Id.* at 526, Table 17-2.

[16] *Id.* at 384, Table 15-3.

[17] *See supra* note 8. Dr. Mabie suggested that he converted the whole person impairment to a rating for leg impairment, but he did not explain how this was done in accordance with the standards of the A.M.A., *Guides.*

[18] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment). On appeal, appellant argued that he was entitled to additional compensation because his right leg was still unstable. However, appellant's schedule award accounted for this condition by including an impairment rating for right leg weakness.

[19] *See* A.M.A., *Guides* 526-27.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 24 percent permanent impairment of his right leg, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2009 and July 7, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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