

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

C.H., Appellant)

and)

DEPARTMENT OF THE NAVY, NAVAL AIR)
STATION, New Orleans, LA, Employer)

**Docket No. 09-2208
Issued: May 11, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2009 appellant filed a timely appeal from the August 17, 2009 merit 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 this case.

ISSUE

The issue is whether appellant has more than a two percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that on May 28, 2008 appellant, then a 49-year-old air conditioning equipment mechanic, sustained a right medial meniscus tear. Appellant received compensation for periods of disability. On August 19, 2008 Dr. Charles M. Pesson, an attending Board-certified orthopedic surgeon, performed a partial medial meniscectomy and a partial lateral meniscectomy on appellant's right knee. The procedure was authorized by the Office. Appellant

eventually returned to his regular work after the August 19, 2008 surgery. He filed a claim alleging that he was entitled to a schedule award due to his May 28, 2008 work injury.

On July 15, 2009 Dr. Pesson indicated that appellant had reached maximum medical improvement on April 17, 2009. He indicated that upon examination in April 2009 appellant had retained active flexion of 135 degrees and retained extension of 10 degrees on the right. Dr. Pesson noted that appellant had mild swelling and minimal crepitation in the right patellofemoral joint and indicated that there was occasional popping in the right knee. Dr. Pesson concluded that appellant had a 10 percent permanent of his right leg due to his partial medial meniscectomy and partial lateral meniscectomy surgery.

The Office medical adviser reviewed Dr. Pesson's report and indicated that appellant underwent a right medial meniscectomy on August 19, 2008 with good results. He noted that appellant had returned to regular work with no pain and concluded that, under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2007), appellant was entitled to receive a schedule award for a two percent permanent impairment of his right leg. The Office medical adviser stated that Dr. Pesson did not explain how his rating of a 10 percent permanent impairment of the right leg was derived in accordance with the standards of the A.M.A., *Guides*.

In an August 17, 2009 decision, the Office granted appellant a schedule award for a two percent permanent impairment of his right leg. The award ran for 5.76 weeks from April 17 to May 27, 2009.

LEGAL PRECEDENT

The schedule award provision of the Act¹ and its implementing regulations² 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* (6th ed. 2007) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.³ It is well established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.⁴

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ *Id.*

⁴ See *Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

ANALYSIS

The Office accepted that on May 28, 2008 appellant sustained a right medial meniscus tear. In an award of compensation dated August 17, 2009, it granted appellant a schedule award for a two percent permanent impairment of his right leg. The award was based on the June 1, 2009 opinion of the Office medical adviser.

In his report, the Office medical adviser indicated that appellant underwent a right medial meniscectomy on August 19, 2008 with good results. He concluded that, under the standards of the A.M.A., *Guides*, appellant was entitled to receive a schedule award for a two percent permanent impairment of his right leg. The Office medical adviser stated that Dr. Pesson, an attending Board-certified orthopedic surgeon, did not explain how his rating of a 10 percent permanent impairment of the right leg was derived in accordance with the standards of the A.M.A., *Guides*.

The Board notes that the Office medical adviser did not adequately explain why he found that appellant had a two percent permanent impairment of his right leg. The Office medical adviser suggested that the two percent impairment rating was warranted by appellant's right knee surgery. He indicated that appellant underwent a right medial meniscectomy on August 19, 2008, but he actually underwent a right partial medial meniscectomy and a right partial lateral meniscectomy on that date. Although the Office had not accepted that appellant sustained a lateral meniscus tear on May 28, 2008, the Board has held that, in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included. It remains unclear whether the Office medical adviser adequately considered whether appellant had such a preexisting impairment that should be included in the impairment rating. The sixth edition of the A.M.A., *Guides* evaluates diagnosis-based impairments of the knee under Table 16-3 (Knee Regional Grid) and an individual who underwent a partial medial meniscectomy and a partial lateral meniscectomy would fall under Class 1 on the table and might be entitled to an impairment rating of up to 13 percent under certain circumstances.⁵ The Board notes that the Office medical adviser did not adequately evaluate appellant's impairment under the standards of the sixth edition of the A.M.A., *Guides*, either under the above-detailed table or some other appropriate section of the A.M.A., *Guides*.⁶

For these reasons, the case should be remanded to the Office for further evaluation of the permanent impairment of appellant's right leg under the standards of the sixth edition of the A.M.A., *Guides*. After such development as it deems necessary, the Office should issue an appropriate decision regarding appellant's entitlement to a schedule award for compensation.

⁵ A.M.A., *Guides* 509, Table 16-3.

⁶ In July 2009 Dr. Pesson concluded that appellant had a 10 percent permanent of his right leg due to his partial medial meniscectomy and partial lateral meniscectomy surgery, but he also did not explain his conclusion under the standards of the A.M.A., *Guides*.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than a two percent permanent impairment of his right leg. The case is remanded to the Office for further development to be followed by the issuance of an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 11, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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