

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

W.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Wilmington, DE, Employer**

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**Docket No. 10-895
Issued: November 2, 2010**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
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 February 18, 2010 appellant filed a timely appeal from the January 28, 2010 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 claim.

ISSUE

The issue is whether appellant has more than five percent impairment to his right lower extremity.

FACTUAL HISTORY

This case was previously on appeal to the Board.¹ On November 10, 2009 the Board set aside the February 3 and 27, 2009 Office decisions and remanded the case for further

¹ Docket No. 09-1043 (issued November 10, 2009). Appellant sustained a right knee sprain and strain on December 17, 2004 when he struck it against a mail tray. By decision dated February 27, 2009, the Office granted appellant a schedule award for five percent right lower extremity impairment.

development of the medical evidence. The facts of the previous Board decision are incorporated herein by reference.

On November 18, 2009 the Office referred appellant, together with copies of medical reports, a statement of accepted facts and instructions, to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. It asked him to perform a physical examination and provide a right lower extremity impairment rating based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*). The amended statement of accepted facts noted that appellant had a prior right knee injury for which he underwent a partial medial meniscectomy. The Office asked Dr. Smith to consider appellant's prior right knee surgery in evaluating his right lower extremity impairment.

In a December 14, 2009 report, Dr. Smith reviewed the medical evidence and provided findings on physical examination. He calculated five percent right leg impairment for Class 1 patellofemoral arthritis based on the A.M.A., *Guides*, sixth edition, Table 16.3 at page 511.

On January 21, 2010 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an Office medical adviser, calculated that appellant had three percent right lower extremity impairment based on Dr. Smith's report and the sixth edition of the A.M.A., *Guides*.² He noted that Dr. Smith found five percent impairment but this was no more than the impairment percentage previously awarded.

By decision dated January 28, 2010, the Office found that appellant had no more than five percent right lower extremity for which he had received a schedule award.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ and its implementing regulations⁴ 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.⁵

² See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ See 20 C.F.R. § 10.404; FECA Bulletin No. 9-03 (issued March 15, 2009) (providing for use of the sixth edition of the A.M.A., *Guides* effective May 1, 2009).

ANALYSIS

The Board finds that this case is not in posture for a decision.

In its November 10, 2009 decision, the Board instructed the Office to refer appellant to a second opinion physician for a right lower extremity impairment rating. The Board further instructed the Office to ask the physician to include consideration of his preexisting right knee impairment for which he underwent a partial medial meniscectomy.⁶

On remand, the amended statement of accepted facts and the Office's instructions to Dr. Smith referenced appellant's prior right knee surgery. The Office asked the physician to include the prior knee surgery in his right lower extremity impairment rating.

In a December 14, 2009 report, Dr. Smith rated five percent right lower extremity impairment for patellofemoral arthritis based on the A.M.A., *Guides*, sixth edition, Table 16.3 at page 511. He did not, however, explain why he did not include impairment based on appellant's partial medial meniscectomy for his preexisting right knee condition. Impairment for a meniscal injury is included in Table 16-3 at page 509. As noted, preexisting impairments are to be included in determining entitlement to compensation under a schedule award. Dr. Smith did not explain why impairment for a meniscal injury was not included in the impairment rating. Therefore, his rating is not sufficient to establish appellant's right lower extremity impairment.

The Board will remand the case to the Office for further medical development. The Office should refer appellant to an appropriate medical specialist for a right lower extremity impairment rating based on the sixth edition of the A.M.A., *Guides*. The physician should give consideration to his partial medial meniscectomy. After such further development as the Office deems necessary, it shall issue a *de novo* decision on the extent of permanent impairment to appellant's right knee.

CONCLUSION

The Board finds that this case is not in posture for a decision.

⁶ It is well established that preexisting impairments to a scheduled member of the body are to be included in determining entitlement to compensation under a schedule award. *See Carol A. Smart*, 57 ECAB 340 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 28, 2010 is set aside. The case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 2, 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