

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

L.C., Appellant)	
)	
and)	Docket No. 10-544
)	Issued: October 26, 2010
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
San Diego, CA, Employer)	
)	

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 December 22, 2009 appellant filed a timely appeal from the August 5, 2009 schedule award decision of the Office of Workers' Compensation Programs and the December 3, 2009 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether appellant has more than 22 percent impairment to his left lower extremity; and (2) whether the Office abused its discretion in denying his request for reconsideration under section 8128(a).

On appeal appellant contends that the Office should have applied the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* to its August 5, 2009 schedule award decision.

FACTUAL HISTORY

On August 17, 2006 appellant, then a 47-year-old border patrol agent, slipped and twisted his left knee in the performance of duty. On August 28, 2006 he underwent left knee medial and lateral meniscal debridement and chondroplasty performed by Dr. Enass N. Rickards, a Board-certified orthopedic surgeon. The Office accepted his claim for a left knee medial meniscus tear and meniscal derangement. On April 30, 2007 appellant filed a claim for a schedule award.

In a June 7, 2007 decision, the Office granted appellant a schedule award based on 10 percent left lower extremity impairment, for 28.8 weeks, from February 23 to September 12, 2007. The extent of impairment was rated under the fifth edition of the A.M.A., *Guides*.¹

In a December 4, 2007 decision, the Office granted him five percent additional left lower extremity impairment.

On June 18, 2008 appellant underwent left knee arthroscopic surgery, including partial chondroplasty of the medial femoral condyle and arthroscopic resection of medial plica and removal of a loose body, performed by Dr. Michael R. Lenihan, a Board-certified orthopedic surgeon, who conducted a schedule award rating on January 13, 2009. On March 16, 2009 Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the findings provided by Dr. Lenihan. He concluded that appellant had a 17 percent permanent impairment of the left lower extremity.

In an April 6, 2009 decision, the Office granted a schedule award for two percent additional left lower extremity impairment.

In an April 28, 2009 report, Dr. Mark T. Selecky, a Board-certified orthopedic surgeon and associate of Dr. Lenihan, reviewed the medical history and provided findings on physical examination. In assessing appellant's degree of left knee permanent impairment, Dr. Selecky explained that appellant's remaining problems with the knee were due to loss and damage of the articular cartilage, from the accepted injury, which required partial medial and lateral menisectomies. He explained that the most accurate and appropriate rating would be based upon Table 17-31, page 544, for arthritis impairment based on cartilage intervals. Since weightbearing films showed one millimeter of medial joint space; applying Table 17-31 provided a 25 percent left lower extremity impairment. Dr. Selecky added that an additional five percent would be given for patellofemoral compartment changes, which were the result of direct trauma, for crepitation and complaints of pain, as outlined in text below Table 17-31, and which had already been agreed upon by Dr. Lenihan and Dr. Harris. He concluded that appellant had 29 percent left lower extremity impairment based on arthritis impairment under Table 17-31 of the fifth edition of the A.M.A., *Guides*.

¹ The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss of use of the lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by 10 percent equals 28.8 weeks of compensation.

On July 11, 2009 Dr. Harris reviewed the record pursuant to the sixth edition of the A.M.A., *Guides*. He stated that Dr. Lenihan had evaluated appellant on April 28, 2009 and rated a 29 percent impairment based upon the fifth edition of the A.M.A., *Guides*.² Dr. Harris found, however, that appellant had 22 percent left lower extremity impairment due to residual moderate degenerative joint disease of the knee with documented joint space narrowing. He applied Table 16-3 at page 511 of the sixth edition of the A.M.A., *Guides*, that state: “as a result of post-traumatic arthritis as a result of having undergone prior arthroscopic partial medial and lateral meniscal debridement.” Dr. Harris explained that the increase in impairment from the previous 17 percent awarded was based upon the April 28, 2009 report, as well as the sixth edition of the A.M.A., *Guides*.

On August 5, 2009 the Office granted appellant a schedule award for an additional 5 percent left lower extremity impairment based on the sixth edition of the A.M.A., *Guides*, or a total left leg rating of 22 percent.

Appellant requested reconsideration. In an August 26, 2009 report, Dr. Harbinder S. Chadha, a Board-certified orthopedic surgeon and an associate of Dr. Lenihan and Dr. Selecky, opined that the Office should have applied the fifth edition of the A.M.A., *Guides* in its August 5, 2009 schedule award decision because the examining physician’s report was dated April 28, 2009.

By decision dated December 3, 2009, the Office denied appellant’s request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the 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

ANALYSIS -- ISSUE 1

On appeal appellant contends that he has 29 percent impairment of the left leg extremity, pursuant to the fifth edition of the A.M.A., *Guides*, based upon Dr. Selecky’s April 29, 2009

² It is clear that Dr Harris is mistaken in this regard. Appellant was evaluated on April 28, 2009 by Dr. Selecky, an associate of Dr. Lenihan.

³ 5 U.S.C. § 8107.

⁴ 20 C.F.R. § 10.404.

⁵ *Id.* at § 10.404.

report. His request was for an increased schedule award. The sixth edition of the A.M.A., *Guides* was made applicable to Office decisions issued after May 1, 2009, notwithstanding an examining physician's report dated prior to May 1, 2009.⁶ The sixth edition of the A.M.A., *Guides* was the proper volume utilized for the August 5, 2009 decision granting appellant an increased schedule award.

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

On April 28, 2009 Dr. Selecky found that appellant had 29 percent left lower extremity impairment based on arthritis and Table 17-31 at page 544 of the fifth edition of the A.M.A., *Guides*. Dr. Selecky found that appellant was entitled to 25 percent impairment of the left lower extremity for one millimeter loss of the knee cartilage interval, and an additional 5 percent for patellofemoral pain and crepitation, but without patellofemoral joint space narrowing.

Due to the change from the fifth to the sixth edition of the A.M.A., *Guides*, the Office requested that Dr. Harris, the Office medical adviser review Dr. Selecky's findings pursuant to the sixth edition. On July 11, 2009 Dr. Harris applied the sixth edition of the A.M.A., *Guides*. He found that appellant had residual moderate degenerative joint disease of the knee with documented joint space narrowing, resulting in 22 percent (Class of Diagnosis 2D) left lower extremity impairment following arthroscopic partial medial and lateral meniscal debridement, according to Table 16-3 at page 511 of the sixth edition of the A.M.A., *Guides*.

Dr. Selecky found that appellant had a one millimeter cartilage interval of the knee joint. Dr. Harris stated that he was utilizing Dr. Selecky's findings in calculating the 22 percent permanent of appellant's left knee. Pursuant to Table 16-3, of the sixth edition, a one millimeter cartilage interval from knee joint arthritis falls into a Class 3 impairment, which is rated from 26 percent to 34 percent. Dr. Harris calculation of a 22 percent impairment, which he noted was based upon a Class 2D, would be for a two millimeters cartilage interval. He did not explain why he selected the Class 2D, rather than Class 3 A-E, which reflects the one millimeter cartilage loss.

This case will be remanded for further development as the Office medical adviser did not properly rate the degree of impairment within Class 3. The Office should request that appellant's treating physician or the Office medical adviser further describe the extent of appellant's impairment pursuant to the sixth edition, Table 16-3. After such further development as necessary, the Office shall issue an appropriate decision.⁷

CONCLUSION

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

⁷ Given the Board's remand for further development of the case, issue 2 relating to the Office's denial of merit review is moot.

ORDER

IT IS HEREBY ORDERED THAT the December 3 and August 5, 2009 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded to the Office for further development consistent with this decision.

Issued: October 26, 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