United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket Nos. 10-1752 & 10-1890**
U.S. POSTAL SERVICE, POST OFFICE, Teaneck, NJ, Employer	)	**Issued: April 29, 2011**

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2010 appellant, through his representative, filed a timely appeal from the April 13, 2010 merit decision of the Office of Workers' Compensation Programs granting a schedule award for his right leg. On July 13, 2010 he filed a timely appeal from the June 8, 2010 merit decision of the Office granting a schedule award for his arms. Pursuant to the Federal Employees' Compensation Act and 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 7 percent permanent impairment of his right arm, a 7 percent permanent impairment of his left arm and a 31 percent permanent impairment of his right leg, for which he received schedule awards.

FACTUAL HISTORY

The Office accepted that on April 14, 2000 appellant, then a 50-year-old letter carrier, sustained a medial meniscus tear of his right leg, due to walking down a slope at work. It paid him compensation for periods of disability. On November 4, 2000 Dr. Michael C. DiStefano, an attending Board-certified orthopedic surgeon, performed right knee surgery including a partial medial meniscectomy, partial lateral meniscectomy, thermal ablation of the patella and chondroplasty of the medial femoral condyle. The procedures were authorized by the Office.

On July 28, 2002 appellant filed a claim for a schedule award due to his accepted employment injury. In a June 26, 2002 report, Dr. Arthur H. Tiger, an attending Board-certified orthopedic surgeon, determined that appellant had a 40 percent permanent impairment of his right leg under the standards of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

The Office subsequently authorized appellant to undergo a total right knee arthroplasty and Dr. DiStefano performed the surgery on May 11, 2005.

Appellant filed a claim for an occupational disease claim on August 2, 2006 stating that as a result of the repetitive tasks required by his job he sustained bilateral carpal tunnel syndrome. He asserted he first realized that this condition was related to his employment on June 9, 2006. The Office accepted that appellant sustained bilateral carpal tunnel syndrome and right trigger thumb. On February 8, 2008 appellant filed another claim for a schedule award due to his accepted employment injuries.

In a November 5, 2007 report, Dr. David Weiss, a Board-certified orthopedic surgeon, found that, under the fifth edition of the A.M.A., *Guides*, appellant had a 35 percent impairment of his right arm, a 12 percent impairment of his left arm and a 50 percent impairment of his right leg. He reported the findings of his physical examination of appellant including findings for range of motion for his wrists, digits and right knee. Dr. Weiss also noted findings for strength and sensory loss in the upper and lower extremities. He determined that the date of maximum improvement for appellant's extremities was November 5, 2007.

The Office referred Dr. Weiss' report to Dr. Henry J. Magliato, a Board-certified orthopedic surgeon serving as an Office medical adviser, to evaluate appellant's arm impairment. On January 28, 2008 Dr. Magliato reviewed Dr. Weiss' measurements and findings and determined that appellant had a 32 percent impairment of his right arm and a 6 percent impairment of his left arm under the fifth edition of the A.M.A., *Guides.* His impairment ratings for the arms differed from those of Dr. Weiss because he calculated different impairments for motion of the right wrist, left wrist and left thumb.

The Office then referred the case to Dr. Andrew A. Merola, a Board-certified orthopedic surgeon serving as an Office medical adviser, to evaluate appellant's leg impairment. On August 27, 2008 Dr. Merola provided an opinion that Dr. Weiss did not provide sufficient objective data to support his findings that appellant had a 50 percent impairment of his right leg under the fifth edition of the A.M.A., *Guides.* On November 1, 2008 he indicated that using the

June 26, 2002 findings of Dr. Tiger showed that appellant had a 21 percent impairment of his right leg under the fifth edition of the A.M.A., *Guides.*

The Office determined that there was a conflict in the medical opinion between the opinion of Dr. Weiss and the opinion of Dr. Magliato regarding appellant's arm impairment and referred him to Dr. Raphael K. Levine, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

On September 17, 2008 Dr. Levine found that appellant had a 10 percent impairment of each arm under the fifth edition of the A.M.A., *Guides.* In December 21, 2008 and April 4, 2009 reports, Dr. Merola indicated that he agreed with Dr. Levine's opinion that appellant had a 10 percent impairment of each arm under the fifth edition of the A.M.A., *Guides.*

In an April 30, 2009 report, Dr. Weiss again determined that appellant had a 50 percent impairment of his right leg under the fifth edition of the A.M.A., *Guides*. He provided a description of his impairment rating method that was similar to that contained in his November 5, 2007 report.

On June 17, 2009 the Office requested that Dr. Weiss rate appellant's impairment in accordance with the standards of the sixth edition of the A.M.A., *Guides* (6th ed. 2009).

On September 21, 2009 the Office received a report from Dr. Weiss. The report contained the findings from Dr. Weiss' November 5, 2007 evaluation but was updated by him to contain a new impairment calculation done on September 10, 2009 under the standards of the sixth edition of the A.M.A., *Guides.* Dr. Weiss concluded that appellant had a 7 percent permanent impairment of his right arm, a 7 percent permanent impairment of his left arm and a 31 percent permanent impairment of his right leg. He explained that, under Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides*, appellant's condition fell under grade modifier 3 in each arm and that he therefore had a default value of eight percent in each arm.[1] Because appellant had a *Quick*DASH score of 54 in the right arm and a *Quick*DASH score of 31 in the left arm, Dr. Weiss indicated that it was appropriate to move one place to the left from the default value found on Table 15-23 and he concluded that appellant had a seven percent impairment in each arm. Under Table 16-3 (Knee Regional Grid) on page 511 of the sixth edition of the A.M.A., *Guides*, he found that appellant fell under Class 3 (within the osteotomy/knee replacement diagnostic category) due to the nature of his surgery and subsequent symptoms.[2] This yielded a default value of 37 percent. Dr. Weiss discussed the relevant grade modifiers[3] noting that appellant had a functional history score of one, a physical examination score of two and a clinical studies score of zero. These scores caused the default value to shift two places to the left on Table 16-3 and yielded a final impairment rating for appellant's right knee of 31 percent.

[1] In each arm, appellant had test findings at the grade modifier 3 level, history grade modifier 3 level and physical findings grade modifier 3 level.

[2] Dr. Weiss actually stated that appellant fell under Class 2, but the findings of record and the default value he choose (37 percent) show that this was an inadvertent error.

[3] *See* A.M.A., *Guides* 515-17, 519-20, Table 16-5 to Table 16-8.

On September 28, 2009 Dr. Merola indicated that he agreed with Dr. Weiss' assessment, under the sixth edition of the A.M.A., *Guides*, that appellant had a 7 percent permanent impairment of his right arm, a 7 percent permanent impairment of his left arm and a 31 percent permanent impairment of his right leg.

In an October 28, 2009 decision, the Office granted appellant a schedule award for a 31 percent permanent impairment of his right leg. In a December 30, 2009 decision, it granted him a schedule award for a seven percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm. The awards were based on the September 10, 2009 impairment calculations of Dr. Weiss under the sixth edition of the A.M.A., *Guides*.

Appellant requested a telephone hearing with an Office hearing representative regarding both decisions. During the February 3, 2010 hearing regarding appellant's leg impairment, counsel argued that appellant's right leg impairment should have been based on the 50 percent impairment found by Dr. Weiss under the fifth edition of the A.M.A., *Guides*. During the April 15, 2010 hearing regarding appellant's arm impairment, he argued that appellant should have received a schedule award for a 10 percent impairment in each arm based on the opinion of Dr. Levine who applied the standards of the fifth edition of the A.M.A., *Guides*. Counsel asserted that the delay in the issuance of the Office's schedule award decisions impermissibly caused his impairment to be rated under the sixth edition of the A.M.A., *Guides*.

In an April 13, 2010 decision, an Office hearing representative affirmed the October 29, 2009 decision. In a June 8, 2010 decision, an Office hearing representative affirmed the December 30, 2009 decision. Both hearing representatives found that the Office properly assessed appellant's impairment under the standards of the sixth edition of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of the Act[4] and its implementing regulations[5] 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.[6]

The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.[7] The Office procedures provide that, effective May 1, 2009, all schedule awards are to be calculated under the sixth edition of the A.M.A., *Guides*. The bulletin describing these procedures indicates that

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id*.

[7] FECA Bulletin No. 09-03 (issued March 15, 2009).

any initial schedule award issued on or after May 1, 2009 should be based on the sixth edition of the A.M.A., *Guides*.[8]

In determining impairment for the upper extremities due to carpal tunnel syndrome under the sixth edition of the A.M.A., *Guides*, reference is made to Table 15-23 (Entrapment/ Compression Neuropathy Impairment) and accompanying relevant text.[9] In Table 15-23, Grade Modifiers are described for test findings, history and physical findings. A survey completed by a given claimant, known by the name *Quick*DASH, is used to further modify the grade and to choose the appropriate numerical impairment rating.[10] After the class is identified, the precise degree of the impairment can be modified by various factors, including functional history, physical examination and clinical studies.[11] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[12]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower extremity to be rated. With respect to the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509. Then the associated class is determined from the Knee Regional Grid and the adjustment grid and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class, modified by the adjustments as calculated.[13]

ANALYSIS

The Office accepted that on April 14, 2000 appellant sustained a medial meniscus tear of his right leg. On November 4, 2000 appellant underwent right knee surgery, including a partial medial meniscectomy, partial lateral meniscectomy, thermal ablation of the patella and chondroplasty of the medial femoral condyle. On May 11, 2005 he underwent a total right knee arthroplasty. The Office later accepted that appellant sustained bilateral carpal tunnel syndrome and right trigger thumb.

In an October 28, 2009 decision, the Office granted appellant a schedule award for a 31 percent permanent impairment of his right leg. In a December 30, 2009 decision, it granted him a schedule award for a seven percent permanent impairment of his right arm and a seven percent permanent impairment of his left arm. The awards were based on the September 10, 2009

[8] *Id.*

[9] *See* A.M.A., *Guides* 449, Table 15-23.

[10] *Id.* at 448.

[11] *Id.* at 406-09.

[12] *Id.* at 23-28.

[13] *See* A.M.A., *Guides* 499-500 (6th ed. 2009).

impairment calculations of Dr. Weiss, an attending osteopath, who concluded that, under the sixth edition of the A.M.A., *Guides*, appellant had a 7 percent permanent impairment of his right arm, a 7 percent permanent impairment of his left arm and a 31 percent permanent impairment of his right leg.[14]

On appeal, counsel argued that appellant should have received a schedule award based on impairment calculations of record that were performed under the standards of the fifth edition of the A.M.A., *Guides*. He asserted that the delay in the issuance of the Office's schedule award decisions impermissibly caused appellant's impairment to be rated under the sixth edition of the A.M.A., *Guides*.

The Board finds, however, that the Office issued its November 28 and December 30, 2009 schedule award decisions after May 1, 2009, the effective date of the sixth edition of the A.M.A., *Guides*, and therefore appellant's claim was properly evaluated under the standards of the sixth edition.[15]

The Board finds that the Office properly based appellant's schedule awards on the September 10, 2009 impairment calculations of Dr. Weiss under the sixth edition of the A.M.A., *Guides*. The Office's determination in this regard is further supported by the September 28, 2009 opinion of Dr. Merola, a Board-certified orthopedic surgeon serving as an Office medical adviser, who indicated that he agreed with Dr. Weiss' impairment assessment made under the sixth edition of the A.M.A., *Guides*.

Dr. Weiss explained that, under Table 15-23 (Entrapment/Compression Neuropathy Impairment) appellant's condition fell under grade modifier 3 in each arm and that he therefore had a default value of eight percent in each arm.[16] Appellant's *Quick*DASH score of 54 in the right arm and 31 in the left arm meant that it was appropriate to move one place to the left from the default value found on Table 15-23.[17] Dr. Weiss concluded that appellant had a seven percent impairment in each arm. Under Table 16-3 (Knee Regional Grid), he found that appellant fell under Class 3 (within the osteotomy/knee replacement diagnostic category) due to the nature of his surgery and subsequent symptoms. Dr. Weiss found that this yielded a default value of 37 percent.[18] He discussed the relevant grade modifiers[19] noting that appellant had a functional history score of one, a physical examination score of two and a clinical studies score

[14] The calculations were based on findings obtained by Dr. Weiss on November 5, 2007. Dr. Weiss properly found that appellant reached maximum medical improvement on that date.

[15] *See supra* notes 7 and 8. Counsel suggested that the Office intentionally delayed the issuance of its schedule awards decision such that appellant's awards would be calculated under the sixth edition of the A.M.A., *Guides*. The Board notes that the matter of appellant's entitlement to schedule award compensation was properly developed by the Office.

[16] *See supra* note 3 at 449, Table 15-23.

[17] *See Id.*

[18] *Id.* at 511, Table 16-3.

[19] *Id.* at 515-17, 519-20, Table 16-5 t Table 16-8.

of zero. These scores caused the default value to shift two places to the left on Table 16-3 and yielded a final impairment rating for appellant's right knee of 31 percent.[20]

For these reasons, appellant did not submit evidence showing that he has more than a 7 percent permanent impairment of his right arm, a 7 percent permanent impairment of his left arm and a 31 percent permanent impairment of his right leg.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 7 percent permanent impairment of his right arm, a 7 percent permanent impairment of his left arm and a 31 percent permanent impairment of his right leg, for which he received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the June 8 and April 13, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 29, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[20] The record contains several impairment rating assessments that are higher than those provided by Dr. Weiss in September 2009. However, these were all calculated under the standards of the fifth edition of the A.M.A., *Guides* and, as previously explained, the sixth edition of the A.M.A., *Guides* provides the relevant standards in the present case.