United States Department of Labor
Employees' Compensation Appeals Board

W.J., Appellant	)	
and	)	**Docket No. 10-1427**
	)	**Issued: March 16, 2011**
DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, CA, 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 April 29, 2010 appellant filed a timely appeal from the December 17, 2009 and April 14, 2010 schedule award decisions of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] 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 has more than a 59 percent impairment of his left leg or more than a 5 percent impairment of his right leg.

FACTUAL HISTORY

On July 6, 1981 appellant, then a 27-year-old sheet metal worker, injured his left knee in the performance of duty when he fell off a step ladder and landed on his left knee at the base of a

[1] 5 U.S.C. §§ 8101-8193.

large metal antenna. The Office accepted his claim for contusion, traumatic patellar tendinitis, torn medial meniscus, consequential right knee aggravation of osteoarthritis and gait alteration affecting the left ankle, and consequential adjustment disorder with mixed anxiety and depression.

Appellant underwent a total left knee replacement on October 4, 2004. He received schedule awards reflecting a 50-percent impairment of his left leg.

On August 25, 2009 appellant requested a schedule award for his left ankle and right knee. Dr. John D. Kaufman, a Board-certified orthopedic surgeon, examined him on September 22, 2009. He complained of bilateral pain, intermittent swelling, popping and clicking, and occasional locking. The left knee showed no swelling, erythema or tenderness. Range of motion was 15 to 110 degrees. Ligaments were stable. There was slight-to-moderate patellofemoral crepitus.

The right knee showed no swelling or erythema but slight-to-moderate tenderness medially and laterally. Range of motion was full. Ligaments were stable and there was slight patellofemoral crepitus.

Dr. Kaufman diagnosed status post left total knee replacement and right knee derangement based on a March 6, 2007 magnetic resonance imaging (MRI) scan.[2] Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), he estimated a 60 percent impairment of the left lower limb based on total knee replacement and decreased motion. Dr. Kaufman estimated a seven percent impairment of the right lower limb based on a two-millimeter cartilage loss.[3]

An Office medical consultant reviewed Dr. Kaufman's findings and used the sixth edition of the A.M.A., *Guides* to evaluate appellant's impairment. Noting that left knee motion of 15 to 110 degrees was a moderate motion deficit under Table 16-23, page 549 of the A.M.A., *Guides*, he determined that appellant had a poor result from his knee replacement. Adjusting for moderate functional problems and moderate findings on physical examination, he determined that appellant had a 59 percent impairment of his left lower limb under Table 16-3, page 511.

Using Table 16-3, page 511, the Office medical consultant found that patellofemoral arthritis of the right knee was a three percent impairment of the lower limb. He saw no clear-cut documentation of roentgenographic narrowing of any compartment of the right knee. Using the same table at page 509, the Office medical consultant found two percent impairment for partial medial meniscectomy. Appellant's functional history and physical examination revealed a mild problem, which clinical studies confirmed, so he made no adjustment to the percentages. Dr. Kaufman combined the three and two percent impairments for a total right leg impairment of five percent.

[2] The MRI scan showed both medial and lateral meniscus tears. Appellant underwent an authorized right partial medial meniscectomy on November 10, 2008.

[3] On March 26, 2009 Dr. Kaufman diagnosed mild osteoarthritis of the right knee. X-rays obtained at that time showed "narrowing of the joint spaces." X-rays of the left knee showed satisfactory position of the knee replacement.

On December 17, 2009 the Office issued a schedule award for a 59 percent impairment of the left lower extremity and a 5 percent impairment of the right. It awarded 46.08 weeks of compensation.

Appellant requested a review of the written record. He argued that he should be paid a schedule award for his consequential adjustment disorder with mixed anxiety and depression. Appellant objected the five percent rating for his right knee, as the claims examiner had informed him he would be receiving seven percent.

In an April 14, 2010 decision, an Office hearing representative affirmed the impairment ratings. The hearing representative found that the opinion of the Office medical consultant represented the weight of the medical evidence.

On appeal, appellant argues that the hearing representative did not address the issues he raised.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[4] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the A.M.A. *Guides*.[5]

For the total loss of a leg, as with amputation at the hip, the Act pays a maximum of 288 weeks of compensation.[6] Partial losses are compensated proportionately.[7]

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[8]

ANALYSIS

Dr. Kaufman, the orthopedic surgeon who examined appellant's knees, estimated impairment ratings using the older fifth edition of the A.M.A., *Guides*. Physicians must now use the sixth edition.[9] Because Dr. Kaufman based his impairment ratings on the outdated edition of

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8107(c)(2).

[7] *Id*. at § 8107(c)(19).

[8] *Id.* at § 8123(a).

[9] For impairment ratings calculated on and after May 1, 2009, the Office should advise any physician evaluating permanent impairment to use the sixth edition. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6.a (January 2010).

the A.M.A., *Guides*, the Office cannot use those percentages to award compensation. The Office properly asked a medical adviser to review the medical findings of Dr. Kaufman under the impairment criteria found in the sixth edition.

Diagnosis-based impairment is the primary method of evaluating the lower limb under the sixth edition. In most cases, only one diagnosis in a region, such as the knee, will be appropriate. If a patient has two significant diagnoses, the examiner should use the diagnosis with the highest impairment rating in that region that is causally related for the impairment calculation.[10]

For the left lower limb, Dr. Kaufman diagnosed status post left knee replacement. Such a surgery can have a good, fair or poor result depending on position, stability, motion or chronic infection. Dr. Kaufman recorded range of motion from 15 to 110 degrees. Flexion to 110 degrees is normal and represents no deficit in motion. A flexion contracture of 15 degrees, however, or an inability to straighten out the leg completely, is considered a moderate motion deficit.[11] Even a moderate motion deficit in a total knee replacement is considered a poor result under Table 16-3, page 511. Because appellant's functional history[12] and physical examination[13] revealed only moderate problems,[14] appellant's left lower limb impairment under Table 16-3, page 511, is 59 percent, which the Office awarded. This was 9 percent more than appellant previously received. The Board will affirm the Office's December 17, 2009 and April 14, 2010 decisions on the impairment rating of appellant's left lower limb.

For the right lower limb, Dr. Kaufman diagnosed derangement based on the March 6, 2007 MRI scan. The MRI scan showed both medial and lateral meniscal tears, for which appellant underwent an authorized partial medial meniscectomy. This is considered a mild problem under Table 16-3, page 509, with a default impairment value of 10 percent.

Dr. Kaufman also found a two-millimeter cartilage loss, presumably from the x-rays he obtained on March 26, 2009, which, he reported at the time, showed narrowing of the joint spaces. The Office medical consultant disagreed. He saw no clear-cut documentation of roentgenographic narrowing of any compartment of the right knee. The Board therefore finds a conflict between appellant's physician and the Office physician on whether appellant has a roentgenographic narrowing of any compartment of the right knee.

The resolution of this conflict is necessary to determine the extent of impairment to the right lower limb. When a patient has two significant diagnoses, such as meniscal injury and arthritis, the examiner should use the diagnosis with the highest impairment rating in that region that is causally related. The Office accepted an aggravation of osteoarthritis in the right knee and

[10] A.M.A., *Guides* 497.

[11] *Id*. at 549 (Table 16-23).

[12] *Id*. at 516 (Table 16-6).

[13] *Id*. at 517 (Table 16-7).

[14] The March 26, 2009 x-ray showed satisfactory position of the knee replacement.

authorized the partial medial meniscectomy. It has an obligation to resolve the conflict on the roentgenographic findings for the purpose of determining the extent of appellant's impairment.

The Board will set aside the Office's December 17, 2009 and April 14, 2010 decisions on the issue of right leg impairment. The Board will remand the case to the Office for further development of the medical evidence. After such further development deemed necessary, the Office shall issue an appropriate schedule award for the right leg.

Appellant argues that the hearing representative did not address certain issues raised when he requested a review of the written record. These included a schedule award for his consequential adjustment disorder with mixed anxiety and depression.

The schedule award provisions of the Act and implementing regulations[15] authorize the Office to pay schedule awards for specified members, functions or organs of the body. The list of body parts includes the arm, leg, hand, foot, eye, thumb, various fingers and toes, and loss of hearing. It includes the breast, kidney, larynx, lung, penis, testicle, tongue, ovary and uterus. A claimant may receive a schedule award for permanent impairment to any of the members, functions or organs listed.

There is no listing for the brain or for psychological conditions such as adjustment disorder with mixed anxiety and depression. There is no provision under the Act or regulations for such a schedule award. The Office may pay compensation for disability or medical expenses resulting from an accepted psychological condition, but it may not pay a schedule award. Appellant's psychological condition does not appear on the schedule award list.

As to the extent of impairment of his right leg, the case is being remanded for further medical development to an impartial medical specialist.

CONCLUSION

The Board finds that appellant has no more than a 59 percent impairment of his left lower extremity. The Board finds that this case is not in posture for decision on the right lower extremity. Further development of the medical evidence is warranted.

[15] 20 C.F.R. § 10.404.

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2010 and December 17, 2009 decisions of the Office of Workers' Compensation Programs are affirmed on the issue of left leg impairment but are set aside on the issue of right leg impairment. The case is remanded for further action in conformance with this decision.

Issued: March 16, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
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James A. Haynes, Alternate Judge
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