United States Department of Labor
Employees' Compensation Appeals Board

BEULAH M. PERRY, Appellant	)	
and	)	**Docket No. 05-966**
	)	**Issued: August 16, 2005**
DEPARTMENT OF VETERANS' AFFAIRS, R. H. JOHNSON MEDICAL CENTER, Charleston, SC, Employer	)	

Appearances:
Beulah M. Perry, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 21, 2005 appellant filed an appeal of a merit decision of the Office of Workers' Compensation Programs dated August 12, 2004, granting a five percent impairment of her left lower extremity and a nonmerit decision of November 23, 2004, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the schedule award issue and the denial of reconsideration.

ISSUES

The issues are: (1) whether appellant sustained greater than a five percent impairment of the left lower extremity, for which she received a schedule award; and (2) whether the Office abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by denying appellant's August 22, 2004 request for a merit review. On appeal, appellant asserts that she sustained greater than a five percent impairment of her left lower extremity as Dr. Keith D. Merrill, an attending Board-certified orthopedic surgeon, opined that she sustained a seven percent impairment.

FACTUAL HISTORY

The Office accepted that on October 27, 2002 appellant, then a 59-year-old licensed practical nurse, slipped and fell on a wet floor, sustaining a left knee contusion with chondromalacia of the patella requiring January 22, 2003 arthroscopic surgery.

Following the October 27, 2002 fall, appellant had intermittent work absences through December 2002. She was followed by Dr. Merrill, who submitted periodic chart notes through December 2002, noting continuing left knee pain with effusion.[1] As conservative measures proved ineffective, he performed a left knee arthroscopy on January 22, 2003 revealing a Grade 2 chondromalacia of the left patella. Appellant remained off work from January 22 to March 14, 2003, at which time she returned to full duty.[2] Dr. Merrill submitted periodic chart notes from April 9 to October 17, 2003, noting continued pain and swelling in the left knee attributable to chondromalacia of the medial femoral condyle, treated with Hyalgan injections.

On April 10, 2003 appellant claimed a schedule award and submitted March 10, May 7 and September 16, 2003 reports from Dr. Merrill, finding that she had attained maximum medical improvement as of March 10, 2003. He opined that she had a seven percent impairment of the left lower extremity based on x-ray findings showing a three millimeter cartilage interval in the medial compartment.[3]

In a February 19, 2004 report, an Office medical adviser reviewed Dr. Merrill's schedule award determinations. He opined that Dr. Merrill's reliance on the cartilage interval was improper as the Office had not accepted degenerative arthritis or a structural knee injury and there were "no awards for chondromalacia." The Office medical adviser opined that appellant, therefore, had a zero percent impairment of the left lower extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

The Office found a conflict of medical opinion between Dr. Merrill, for appellant and the Office medical adviser, for the government. To resolve this conflict, the Office referred her, the medical record and a statement of accepted facts to Dr. Scott A. Stegbauer, a Board-certified orthopedic surgeon. He submitted a May 25, 2004 report, noting that appellant had changed her work schedule as she could no longer work for five days consecutively due to continuing left knee symptoms. On examination Dr. Stegbauer found posterolateral tenderness of the left knee with no atrophy, weakness or effusion. He observed left knee flexion to 120 degrees which he characterized as normal. Dr. Stegbauer opined that an x-ray obtained that day showed "some narrowing of the medial compartment" with a cartilage interval between three and four millimeter but, "no loss of joint space." He then diagnosed chondromalacia of the medial femoral condyle with a "minimal loss of joint space" due to preexisting degenerative arthritis.

[1] A December 4, 2002 magnetic resonance imaging (MRI) scan of appellant's left knee showed mild degeneration of the medial compartment.

[2] Appellant received medical management field nurse services from March 11 to April 17, 2003.

[3] According to Table 17-31, page 544 of the fifth edition of the A.M.A., *Guides*, entitled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals," a three millimeter cartilage interval of the knee equals a seven percent impairment of the lower extremity. A normal interval is noted at four millimeter.

Referring to Table 17-31, page 544 of the A.M.A., *Guides*, Dr. Stegbauer found that a cartilage interval between three and four millimeter equaled a "four percent impairment of the lower extremity," three percent due to preexisting arthritis and one percent "strictly from a change in symptomatology" following the October 27, 2002 fall. In an attached worksheet, he found a 30 degree loss of left knee flexion and recommended a 1, 2 or 5 percent impairment of the left knee due primarily to "old" degenerative arthritis.

In a July 8, 2004 report, an Office medical adviser reviewed Dr. Stegbauer's report and opinioned that appellant had reached maximum medical improvement. He noted that Dr. Stegbauer's "use of the [A.M.A.,] *Guides* [was] interesting but may not be valid. Table 17-31 footnote would allow five percent for patella pain after direct blow. The medical adviser, therefore, concluded that appellant had a five percent impairment of the left lower extremity.

By decision dated August 12, 2004, the Office awarded appellant a schedule award for a 5 percent impairment of the left lower extremity, equivalent to 14.4 weeks of compensation. The period of the award ran from May 25 to September 2, 2004.

In an August 22, 2004 letter, appellant requested reconsideration. She asserted that she continued to experience severe pain in her left knee and could no longer walk for prolonged periods. Appellant submitted additional evidence.

In a September 29, 2004 report, Dr. Merrill noted that appellant could no longer work five days consecutively due to severe left knee pain. He diagnosed degenerative arthrosis of the left knee "exacerbated by an injury at work." Dr. Merrill administered Hyalgan injections to appellant's left knee on October 19 and 27, 2004 and on November 3, 2004.[4]

By decision dated November 23, 2004, the Office denied reconsideration on the grounds that the evidence appellant submitted in support of her request was repetitious or immaterial. The Office found that Dr. Merrill's reports were either copies of chart notes previously submitted or did not address the schedule award issue. The Office noted that Dr. Stegbauer's opinion continued to represent the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking compensation under the Act[5] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[6]

[4] Appellant also submitted copies of Dr. Merrill's chart notes previously of record, dated July 22 and 29, August 5, September 16 and 30 and October 17, 2003.

[5] 5 U.S.C. §§ 8101-8193.

[6] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

The schedule award provision of the Act[7] and its implementing regulation[8] sets 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.[9]

Section 8123(a) of the Act provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[10] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[11] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[12]

ANALYSIS -- ISSUE 1

The Office accepted that on October 27, 2002, appellant sustained a left knee contusion with chondromalacia of the patella requiring January 22, 2003 arthroscopic surgery. She then claimed a schedule award. Dr. Merrill, an attending Board-certified orthopedic surgeon, opined in March 10, May 7 and September 16, 2003 reports, that according to Table 17-31, page 544 of the fifth edition of the A.M.A., *Guides*, appellant had a seven percent impairment of the left lower extremity based on radiographic findings of a three millimeter cartilage interval in the medial compartment. An Office medical adviser opined on February 19, 2004 that the cartilage interval was an improper basis for a schedule award where the Office had not accepted degenerative arthritis or a structural knee injury. He, therefore, recommended a zero percent impairment.

The Office then found a conflict of medical opinion between Dr. Merrill and the Office medical adviser. Pursuant to 5 U.S.C. § 8123(a), the Office appointed Dr. Stegbauer, a Board-certified orthopedic surgeon, as an impartial medical specialist to resolve the conflict. He submitted a May 25, 2004 report finding either a one, two, four or five percent impairment of the

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (2003).

[9] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[10] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[11] *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

[12] *Anna M. Delaney*, 53 ECAB 384 (2002).

left lower extremity based on his interpretation of the A.M.A., *Guides*. An Office medical adviser reviewed Dr. Stegbauer's report on July 8, 2004 and found that his application of the A.M.A., *Guides* was possibly invalid. He recommended a five percent impairment based on a different portion of the A.M.A., *Guides*. The Office then issued an August 12, 2004 decision, finding that appellant sustained a five percent impairment of the left lower extremity. The Office noted in its November 23, 2004 decision, that Dr. Stegbauer's opinion was accorded the weight of the medical evidence in the case.

The Board finds that Dr. Stegbauer did not properly utilize the A.M.A., *Guides*. Referring to Table 17-31, page 544 of the A.M.A., *Guides*, he found that a cartilage interval between three and four millimeters equaled a "four percent impairment of the lower extremity," three percent due to preexisting arthritis and one percent "strictly from a change in symptomatology." However, Table 17-31, entitled "Arthritis Impairments based on Roentgenographically Determined Cartilage Intervals," does not allow for such a rating. Table 17-31 provides percentages of impairment for cartilage intervals ranging from zero to three millimeters, with four millimeters noted as a normal interval. There are no ratings provided for intervals between three and four millimeters. It is, therefore, unclear as to how Dr. Stegbauer arrived at the three percent rating. Also, this table mentions nothing about an additional impairment based on a change in symptoms. Thus, the Board finds that his report is of diminished probative value as it did not conform to the A.M.A., *Guides*.[13]

Also, Dr. Stegbauer's report was equivocal in assigning a definite percentage of impairment. At various points in his opinion, he recommended either a one, two, four or five percent impairment of the left lower extremity. Also, Dr. Stegbauer indicated that left knee x-rays showed both "no loss of joint space" and a "minimal loss of joint space." Thus, the probative value of Dr. Stegbauer's opinion is further diminished by its indefinite character.[14]

The Board, therefore, finds that the Office erred in relying on Dr. Stegbauer's present opinion as he did not properly apply the A.M.A., *Guides* and offered varying percentages of impairment. As set forth above, these deficiencies prevent his opinion from carrying the weight of the medical evidence and resolving the conflict of medical opinion. Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical opinion evidence and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[15] In this case, the Office did not request a supplemental report. Therefore, the case will be remanded for further development.

[13] *Derrick C. Miller*, 54 ECAB ___ (Docket No. 02-140, issued December 23, 2002); *James Kennedy Jr., supra* note 9 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

[14] *See Steven S. Saleh*, 55 ECAB ___ (Docket No. 03-2232, issued December 12, 2003).

[15] *Harry T. Mosier*, 49 ECAB 688 (1998).

On remand of the case, the Office shall request that Dr. Stegbauer submit a supplemental report clarifying his previous opinion regarding the appropriate percentage of impairment, clearly setting forth the tables and grading schemes of the A.M.A., *Guides* he relied upon in reaching this percentage of impairment. After this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

As the case must be remanded for further development to determine the appropriate percentage of impairment due to the accepted injury, the second issue regarding whether the Office abused its discretion by denying appellant's request for a merit review of the schedule award decision is moot.

CONCLUSION

The Board finds that the case is not in posture for a decision as the case must be remanded for further development to determine the percentage of impairment of appellant's left knee.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 23 and August 12, 2004 are set aside and the case remanded to the Office for further development consistent with this opinion.

Issued: August 16, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board