United States Department of Labor
Employees' Compensation Appeals Board

PAUL J. NAVARETTE, Appellant	)	
and	)	**Docket No. 05-895**
	)	**Issued: July 11, 2005**
DEPARTMENT OF JUSTICE, U.S. BORDER PATROL, Chula Vista, CA, Employer	)	

Appearances:
Paul J. Navarette, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 3, 2005 appellant filed an appeal of the Office of Workers' Compensation Programs' merit decisions dated March 12, July 16 and December 9, 2004, granting a schedule award for a two percent impairment of the lower right extremity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision in this case.

ISSUE

The issue is whether appellant has more than a two percent impairment of the lower right extremity.

FACTUAL HISTORY

On February 7, 2003 appellant, a 40-year-old border patrol agent, filed a traumatic injury claim alleging that he twisted his knee on that date when he stepped up on elevated ground during an investigation of suspected illegal aliens. On March 24, 2003 the Office accepted appellant's claim for "tear of medial meniscus, right knee."

The Office authorized a right knee arthroscopy and partial medial meniscectomy, which was performed on March 26, 2003. In an unsigned report dated March 26, 2003, Dr. Michael R. Lenihan, a Board-certified orthopedic surgeon, described the surgical procedure, stating that he found an "extensive bucket-handle tear of the medial meniscus extending from the posterior horn to the anterior horn," which required him to excise the bucket-handle portion of the meniscus. In a report dated April 7, 2003, Dr. Lenihan noted his impression of "status post right knee arthroscopy and subtotal medial meniscectomy, but, for all practical purposes, this should be considered a complete meniscectomy." In reports dated May 20 and June 19, 2003, he again referred to having performed a subtotal medial meniscectomy.

In a July 15, 2003 "Permanent and Stationary Report," Dr. Lenihan provided a diagnosis of "right knee medial meniscus tear status post medial meniscectomy -- total." He indicated that because he felt the tear was not repairable, appellant underwent excision, resulting in a total meniscectomy. Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* Dr. Lenihan used a diagnosis-based estimate in concluding that appellant's total meniscectomy of the right medial meniscus represented a seven percent impairment of the lower extremity.

The Office referred the case record to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and medical consultant for review. In a report dated September 22, 2003, he provided a diagnosis of "status post right knee arthroscopy with arthroscopic partial medial meniscectomy." Applying the fifth edition of the A.M.A., *Guides* (Table 17-33, page 546), Dr. Harris concluded that appellant's residual impairment for having undergone a partial medial meniscectomy resulted in a two percent impairment of the right lower extremity. He opined that the date of maximum medical improvement was July 15, 2003, when appellant was deemed by his treating physician to have reached a permanent and stationary status.

By decision dated December 12, 2003, the Office granted appellant a schedule award for a two percent impairment of his right lower extremity. The award ran for 5.76 weeks.

By letter dated February 27, 2004, appellant requested reconsideration. In support of his request, he submitted a report from Dr. Mark T. Selecky, a Board-certified orthopedic surgeon,[1] who examined appellant and reviewed his history. He concluded that appellant had undergone a total medial meniscectomy of the right knee. Dr. Selecky opined that according to the diagnosis-based estimates on Table 17-33 on page 546 of the A.M.A., *Guides*, he had a seven percent impairment of the right lower extremity.

By decision dated March 12, 2004, finding that appellant had not undergone a total meniscectomy, the Office denied modification of its December 12, 2003 decision.

On April 14, 2004 appellant submitted a request for reconsideration and a report dated March 26, 2004 from Dr. Lenihan, who explained in detail why he had classified appellant's surgery as a total meniscectomy in his permanent and stationary report of July 15, 2003. He stated that the photographs relative to the March 26, 2003 surgery clearly revealed that only a

[1] The Board notes that Dr. Selecky and Dr. Lenihan are practitioners in Lenihan, Selecky & Chada Orthopedics sports medical center in Chula Vista, California.

small residual nubbin of meniscus remained following the resection of the bucket-handle tear, a smaller portion, in fact, than would have remained if a total meniscectomy had been performed. Dr. Lenihan indicated that appellant's "medial meniscus [had] been totally resected for any clinical or functional purposes" and that the "very small remaining nubbin of tissue at the meniscal synovial junction [was] nonfunctional and [was] not serving any useful purpose." He stated that in addition to having removed the bucket-handle portion of the meniscus tear, he had resectioned the peripheral remnant, leaving essentially no functioning meniscus remaining.

The Office referred the case to Dr. Harris for review. In a report dated May 1, 2004, he opined that Dr. Lenihan's description in his March 26, 2003 operative report, of having removed only the torn portion of the meniscus, was consistent with having undergone a partial medial meniscectomy. Dr. Harris further reasoned that leaving behind a stable rim indicated that appellant did have some stable and functioning meniscus.

By decision dated July 16, 2004, the Office denied modification of the March 12, 2004 decision.

On October 1, 2004 appellant again requested reconsideration, disputing the Office's decision and Dr. Harris' opinion and requesting an independent review of the evidence submitted. He contended that he was at risk to develop arthritis in the future, because the remaining tissue offered no cushion to the joints. Appellant provided an x-ray of the inside of his right knee joint taken after the March 26, 2003 surgical procedure.

The Office again referred the case to Dr. Harris for a consultant review. He reviewed the entire medical record, including the newly submitted x-ray. In a report dated November 27, 2004, Dr. Harris concluded that the intra-operative photograph provided by appellant supported that he had undergone arthroscopic partial medial meniscectomy, resulting in a two percent impairment of his right lower extremity.

By decision dated December 9, 2004, the Office denied modification of the July 16, 2004 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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. The Act, however, does not specify the manner in which the percentage of loss shall be determined. The method used in making such a determination is a matter that rests within the sound discretion of the Office.[4] 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

[2] 5 U.S.C. §§ 8101-8193.

[3] 20 C.F.R. § 10.404.

[4] *Linda R. Sherman*, 56 ECAB ___ (Docket No. 04-1510, issued October 14, 2004); *Daniel C. Goings*, 37 ECAB 781, 783-84 (1986).

there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[5]

The Office procedures provide that, 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.[6]

The A.M.A., *Guides* provides impairment ratings of the lower extremities for diagnosis-based estimates, including specific disorders of the knee, such as a torn meniscus or meniscectomy.[7]

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.[8] 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.[9]

ANALYSIS

Appellant received a schedule award for a two percent impairment of his right lower extremity based upon the Office's determination that he had undergone a partial medial meniscectomy. He contests this award, alleging that he underwent a total meniscectomy. The Board finds that this case is not in posture for decision, in that there is a conflict in medical opinion necessitating referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

Dr. Lenihan, a Board-certified orthopedic surgeon, who performed appellant's March 26, 2003 knee surgery, reported that he found an "extensive bucket-handle tear of the medial meniscus extending from the posterior horn to the anterior horn," which required him to excise the bucket-handle portion of the meniscus. Although initially Dr. Lenihan identified the operation as "arthroscopy of the right knee and partial medial meniscectomy," in a report dated April 7, 2003, he opined that "for all practical purposes, this should be considered a complete meniscectomy. In his July 15, 2003 "Permanent and Stationary Report," Dr. Lenihan provided a

[5] *Ronald R. Kraynak*, 53 ECAB 130, 132 (2001).

[6] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (March 1995).

[7] *Id.* at 545-48, Table 17-33.

[8] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002).

[9] *William C. Bush*, 40 ECAB 1064 (1989).

final diagnosis of "right knee medial meniscus tear status post medial meniscectomy -- total," indicating that because he felt the tear was not repairable, appellant underwent excision, resulting in a total meniscectomy. In his March 26, 2004 report, Dr. Lenihan explained in detail why he had classified appellant's surgery as a total meniscectomy, stating that the photographs relative to the surgery clearly revealed that only a small residual nubbin of meniscus remained following the resection of the bucket-handle portion of his medial meniscus tear, a smaller portion, in fact, than would have remained if a total meniscectomy had been performed. He indicated that appellant's "medial meniscus [had] been totally resected for any clinical or functional purposes" and that the very small remaining nubbin of tissue at the meniscal synovial junction [was] nonfunctional and [was] not serving any useful purpose." Dr. Lenihan stated that in addition to having removed the bucket-handle portion of the meniscus tear, additional resection of the peripheral remnant had been performed, leaving essentially no functioning meniscus remaining. Referring to the A.M.A., *Guides* (5th ed.), he used a diagnosis-based estimate in concluding that appellant's total meniscectomy of the right medial meniscus equated to a seven percent impairment of the lower extremity.

On the other hand, the Office's orthopedic consultant, Dr. Harris, opined that appellant had undergone arthroscopic partial medial meniscectomy. He opined that Dr. Lenihan's description in his March 26, 2003 operative report, of having removed only the torn portion of the meniscus, was consistent with having undergone a partial medial meniscectomy. Dr. Harris further reasoned that leaving behind a stable rim indicated that appellant did have some stable and functioning meniscus. Applying the fifth edition of the A.M.A., *Guides* (Table 17-33, page 546), he concluded that appellant's residual impairment for having undergone a partial medial meniscectomy resulted in a two percent impairment of the right lower extremity.

Section 8123(a) of the Act provides in part: "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."[10]

Dr. Lenihan and Dr. Harris disagreed on whether appellant had undergone a partial or total meniscectomy and, therefore, disagreed on how to evaluate his impairment under the fifth edition of the A.M.A., *Guides*. Although Dr. Lenihan's operative report referred to a partial meniscectomy, he made clear in his later reports that, in his opinion, he had "for all practical purposes," performed a total meniscectomy for which appellant was entitled to a schedule award. Dr. Harris relied on Dr. Lenihan's diagnosis as stated in his operative report, as well as the intra-operative photograph, which, in his opinion, supported that appellant had undergone arthroscopic partial medial meniscectomy, resulting in a two percent impairment of his right lower extremity. To resolve this conflict**,** the Office shall refer appellant, together with the medical record and a statement of accepted facts, to an appropriate impartial medical specialist for a well-reasoned opinion on the extent of impairment of the lower right extremity causally related to the accepted employment injury. After such further development of the evidence as may be necessary, the Office shall issue an appropriate final decision.

[10] 5 U.S.C. § 8123(a).

CONCLUSION

The Board finds that this case is not in posture for decision. There is a conflict in medical opinion necessitating referral to an impartial medical specialist pursuant to 5 U.S.C § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 9, July 16 and March 12, 2004 and December 12, 2003 are set aside and the case is remanded for further action consistent with this opinion.

Issued: July 11, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member