United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
and	)	**Docket No. 06-1537**
	)	**Issued: October 16, 2006**
U.S. POSTAL SERVICE, AIRMAIL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 June 28, 2006 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated February 14, 2006, finding 13 percent impairment of his left lower extremity. Pursuant to 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 13 percent permanent impairment of his left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On May 12, 2001 appellant, then a 51-year-old retired mail handler, filed an occupational disease claim alleging that he developed torn ligaments in his left knee and right shoulder in the performance of duty. Appellant first became aware of his condition on July 9, 2000. On the reverse of the form, appellant's supervisor indicated that appellant reported his condition on July 21, 2000 and received disability retirement on January 22, 2001.[1]

A magnetic resonance imaging scan dated July 18, 2000 demonstrated a lateral meniscal tear associated with a meniscal cyst and mild cartilage loss medially in appellant's left knee.

The Office accepted appellant's claim for a tear of the lateral meniscus of the left knee and authorized surgery on November 20, 2001. On April 22, 2002 Dr. John J. McPhilemy, an osteopath, performed an diagnostic arthroscopy of appellant's left knee, a partial lateral meniscectomy, partial medial meniscectomy, chondroplasty of medial and lateral femoral condyles. On August 26, 2002 Dr. McPhilemy opined that appellant's left knee condition had reached maximum medical improvement. He stated that appellant demonstrated an underlying arthritic condition of his knee.

Appellant's attorney requested a schedule award on July 15, 2004. He submitted a report from Dr. Nicholas Diamond, an osteopath, dated April 22, 2004, who examined appellant's right shoulder and left knee. He reported that appellant's left knee had tenderness and flexion of 130 degrees with pain. Dr. Diamond noted that appellant had abnormal muscle bulk of the left lower extremity, quadriceps and gastrocnemius muscle strength was 4+/5 and calf circumference was 42 centimeters on the right and 40 on the left. Appellant's thigh circumference was 48 on the right and 45 on the left. He concluded that appellant had 4/5 motor strength deficit of the left quadriceps, a 12 percent impairment, 4/5 motor strength deficit of the left gastrocnemius a 17 percent impairment and an additional 3 percent impairment due to pain. Dr. Diamond concluded that appellant had 30 percent impairment of his left lower extremity and provided page citations to the American Medical Associations, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).

On July 12, 2004 Dr. McPhilemy indicated that appellant sought treatment for recurrent left knee pain. He provided a knee injection and suggested additional diagnostic studies. On July 26, 2004 Dr. McPhilemy agreed with Dr. Diamond's impairment rating.

The Office medical adviser reviewed Dr. Diamond's report on January 22, 2005. He found that, based on the diagnosis of partial meniscectomy of the medial and lateral meniscus, appellant had 10 percent impairment. The Office medical adviser allowed an additional 3 percent due to pain and concluded that appellant had a total 13 percent impairment of the left lower extremity. He stated: "It is not appropriate to use strength as the primary determinant of impairment…." The Office medical adviser provided citations to the A.M.A., *Guides*.

[1] The Board has previously issued a decision in this claim regarding appellant's entitlement to compensation benefits for the period July 9, 2000 to February 26, 2002. *Ronald L. Feggans*, Docket No. 05-682 (issued June 22, 2005).

By decision dated January 31, 2005, the Office granted appellant a schedule award for 13 percent impairment of his left lower extremity. Appellant, through his attorney, requested an oral hearing on February 2, 2005. Appellant's attorney appeared at the oral hearing on November 29, 2005. He asserted that appellant was entitled to the higher of the two ratings, the functional rating of Dr. Diamond, rather than the diagnostic rating by the Office medical adviser.

By decision dated February 14, 2006, an Office hearing representative affirmed the January 31, 2005 decision finding that the Office medical adviser's rating was more appropriate in accordance with the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 regulation as the appropriate standard for evaluating schedule losses.

The A.M.A., *Guides* state that manual muscle testing depends on the examinee's cooperation and is subject to his or her conscious and unconscious control. To be valid, the results should be concordant with other observable pathologic signs and medical evidence.[4] The A.M.A., *Guides* further require that measurements be made by one or two observers and if made by one observer that the measurements should be consistent on different occasions.[5]

ANALYSIS

The Office accepted that appellant sustained a tear of the lateral meniscus left knee and authorized surgery. Appellant's attending physician, Dr. McPhilemy, an osteopath, performed a diagnostic arthroscopy of appellant's left knee, a partial lateral meniscectomy, partial medial meniscectomy, chondroplasty of medial and lateral femoral condyles on April 22, 2002. He requested a schedule award and submitted a report dated April 22, 2004 from Dr. Diamond, an osteopath, who discussed appellant's complaints of weakness and noted findings of tenderness in the left knee. Dr. Diamond measured his range of motion and performed manual muscle testing. He opined that appellant had motor strength deficit of the left quadriceps, 12 percent impairment and motor strength deficit of the left gastrocnemius, 17 percent impairment. Dr. Diamond added 3 percent for pain and concluded that appellant had 30 percent impairment of his left lower extremity.

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] A.M.A., *Guides* 531.

[5] *Id.*

Regarding the impairment rating for motor strength deficit, Dr. Diamond failed to provide the necessary physical findings regarding motor strength weakness in accordance with Tables 17-8 and 17-7 of the A.M.A., *Guides*.[6] He also failed to indicate whether his testing was evaluated by two persons or on two different occasions.[7] Dr. Diamond provided appellant an additional award of three percent for pain under Chapter 18 of the A.M.A., *Guides*. The Board notes, however, that examiners should not use Chapter 18 to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[8] Dr. Diamond did not explain why appellant would be entitled to an additional impairment rating for pain under this chapter. Consequently, Dr. Diamond's impairment rating does not conform to the A.M.A., *Guides*.

In a report dated January 22, 2005, the Office medical adviser reviewed Dr. Diamond's findings and properly determined that Dr. Diamond's findings regarding motor strength loss were not an appropriate basis for a schedule award. The Office medical adviser stated that appellant had 10 percent impairment due to partial meniscectomy of both the lateral and medial meniscus in the left lower extremity.[9] However, the Office medical adviser allowed an additional three percent due to pain under Chapter 18 without providing any explanation of the policies incorporated in FECA Bulletin No. 01-5.[10]

CONCLUSION

The Board finds that the medical evidence does not support greater than a 13 percent impairment of the left lower extremity for which appellant received a schedule award.

[6] A.M.A., *Guides* 531-32.

[7] *See supra* note 4.

[8] Section 18.3b of Chapter 18 at page 571 of the fifth edition of the A.M.A., *Guides* provides that "Examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the [A.M.A.,] *Guides*." *Frantz* Ghassan, 57 ECAB ___ (Docket No. 05-1947, issued February 2, 2006). *See also* Linda *Beale*, 57 ECAB ___ (Docket No. 05-1536, issued February 15, 2006).

[9] A.M.A., *Guides* 546-47, Table 17-33.

[10] FECA Bulletin No. 01-05 (issued January 29, 2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 14, 2006 is affirmed, as modified.

Issued: October 16, 2006
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