United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 08-99**
	)	**Issued: May 13, 2008**
U.S. POSTAL SERVICE, MAIN POST OFFICE, Novato, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 10, 2007 appellant filed a timely appeal from two September 6, 2007 decisions of the Office of Workers' Compensation Programs, one determining her wage-earning capacity and the other regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's monetary compensation benefits to zero on the grounds that her actual earnings as a modified letter technician properly represented her wage-earning capacity; and (2) whether she has established that she sustained greater than a 24 percent permanent impairment of the right lower extremity.

FACTUAL HISTORY

The Office accepted that on August 13, 2005 appellant, then a 47-year-old letter carrier, sustained a right knee sprain, fractured right patella and derangement of the right knee when

exiting her official vehicle. She stopped work on the date of injury and returned to a temporary, sedentary-duty position on September 13, 2005.

Appellant submitted reports from August 13 to October 31, 2005 from Dr. Jeffrey Lee Gao, an attending Board-certified physician in occupational medicine. Dr. Gao diagnosed a right fibular fracture with continued pain and swelling.[1] On November 3, 2005 appellant underwent right knee arthroscopy, authorized by the Office. She returned to modified duty on December 15, 2006.

Appellant submitted progress notes through May 3, 2006 from Dr. Gao and Dr. Michael Meehan, an attending Board-certified orthopedic surgeon. Both physicians noted continued right knee pain and swelling, an antalgic gait and restricted motion.[2]

In a May 24, 2006 report, Dr. Gao noted a history of patellofemoral syndrome with arthritic changes in the right knee, first diagnosed by x-ray in July 2005 approximately one month before the August 13, 2005 injury. He opined that appellant had reached maximum medical improvement. Appellant had intermittent right knee pain rated at 5 to 6 out of 10, minimal swelling, occasional tingling, numbness, popping and clicking. Range of motion was full. Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*), Dr. Gao found that according to Table 17-5, page 529,[3] appellant had a seven percent whole person impairment due to an antalgic limp. Knee flexion limited to 70 degrees equaled an 8 percent whole person impairment according to Table 17-10, page 537.[4] Appellant had right knee strength at four out of five but was "not a good candidate for manual muscle testing and rating" due to pain. Dr. Gao also opined that appellant had a four percent whole person impairment according to Table 17-33, page 546[5] due to medial and lateral partial meniscectomy. He added a two percent impairment due to moderate pain. Dr. Gao noted permanent restrictions against lifting more than 15 pounds and "carrying of the third bundle." Dr. Gao prescribed a 10-minute rest break each hour while delivering mail and after standing for 1 hour.

On June 6, 2006 appellant claimed a schedule award. The Office referred the medical record to an Office medical adviser for review. In a June 24, 2006 report, an Office medical adviser stated that he could not accurately calculate a schedule award without the July 2005 x-ray report and November 3, 2005 operative report mentioned by Dr. Gao.

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[1] A magnetic resonance imaging (MRI) scan of the right knee performed on September 6, 2005 showed a probable medial meniscal tear, ligamentous tears, abnormalities of the proximal fibula, effusion, chondromalacia or patellar degeneration.

[2] Dr. Meehan made similar findings in an August 29, 2006 report.

[3] Table 17-5, page 529 of the fifth edition of the A.M.A., *Guides* is entitled "Lower Limb Impairment Due to Gait Derangement."

[4] Table 17-10, page 537 of the fifth edition of the A.M.A., *Guides* is entitled "Knee Impairment."

[5] Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment Estimates for Certain Lower Extremity Impairments."

On November 2, 2006 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. In a December 4, 2006 report, Dr. Swartz reviewed the record and statement of accepted facts and opined that appellant had reached maximum medical improvement. He related appellant's complaints of right knee pain. On examination, Dr. Swartz noted that appellant walked with a limp, had difficulty squatting, had three centimeters (cm) of swelling in the right knee, one cm atrophy of the right calf, flexion limited by 5 degrees, extension limited to 90 degrees and quadriceps weakness. He noted permanent restrictions against pulling, pushing and lifting more than 15 pounds, no squatting or kneeling, no more than one hour of climbing and no more than six hours of walking, standing, bending or stooping.

On February 2, 2007 the employing establishment offered appellant a modified letter carrier technician, earning $46,135.00 a year or $887.21 a week. The job required walking delivering mail six hours a day, carrying a satchel weighing no more than 15 pounds. Pushing, pulling and lifting were limited to 15 pounds, with no squatting or kneeling. Appellant accepted the offer on May 18, 2007. The record does not indicate when appellant began work.

On August 8, 2007 the Office asked the medical adviser who previously reviewed the record to review Dr. Swartz's report and calculate a schedule award. In an August 19, 2007 report, the Office medical adviser noted that the Office did not obtain the July 2005 x-ray report or November 3, 2005 operative report. Referring to the A.M.A., *Guides*, the medical adviser found a Grade 2 pain impairment according to Table 16-10, page 482.[6] He then multiplied the maximum 7 percent femoral nerve impairment by the 70 percent grade for pain, resulting in a 4.9 percent impairment due to pain, rounded up to 5 percent. Flexion limited to 90 degrees equaled a 10 percent impairment with an additional 10 percent impairment for flexion contracture. Using the Combined Values Chart, the Office medical adviser combined the 20 percent impairment for restricted motion with the 5 percent impairment due to pain to equal a 24 percent impairment of the right leg. He concurred with Dr. Swartz that appellant had reached maximum medical improvement. The medical adviser advised that the rating "was calculated without the benefits of reviewing actual x-ray reports or reviewing the operative report."

In an August 22, 2007 letter, the employing establishment letter noted that appellant had a light-duty assignment.

In August 29 and 31, 2007 reports, Dr. Gao renewed previous work restrictions, adding that she should work no more than five days a week.

In a September 6, 2007 e-mail, the employing establishment confirmed the pay rate for the position appellant accepted on May 18, 2007.

By decision dated September 6, 2007, the Office found that the position of modified letter technician properly represented her wage-earning capacity. The Office found that appellant had performed the position successfully since May 18, 2007, with actual earnings of $887.21 a week,

[6] Table 16-10, page 482 of the fifth edition of the A.M.A., *Guides* is entitled, "Determining Impairment of the Upper Extremity Due to Sensory Deficits or Pain Resulting from Peripheral Nerve Disorders."

exceeding the current pay rate of $835.14 for her job and step when injured. The Office therefore terminated appellant's monetary compensation benefits.[7]

By decision dated September 6, 2007, the Office granted appellant a schedule award for a 24 percent permanent impairment of the right lower extremity. The period of the award ran from December 5, 2005 to April 2, 2007.[8]

LEGAL PRECEDENT -- ISSUE 1

Section 8115(a) of the Federal Employees' Compensation Act[9] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.[10] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[11] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[12] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[13] Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[14]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a right knee fracture with sprain and internal derangement due to an August 13, 2005 work incident. Appellant stopped work on August 13, 2005 and underwent arthroscopic surgery on her right knee on November 3, 2005 to repair meniscal tears. Dr. Gao, an attending physician Board-certified in occupational medicine, released appellant to restricted duty in November 2005. Appellant returned to modified duty on

[7] The Office noted that appellant remained entitled to appropriate medical benefits to treat residuals of the accepted injury.

[8] The Office noted that appellant reached maximum medical improvement as of May 3, 2005 but continued to receive compensation through December 4, 2005. The Office delayed the beginning of the schedule award until December 5, 2005.

[9] 5 U.S.C. §§ 8101-8193.

[10] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[11] *Lottie M. Williams*, 56 ECAB 302 (2005).

[12] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[13] 20 C.F.R. § 10.403(c).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

December 5, 2006. On February 2, 2007 the employing establishment offered her a job as a modified letter carrier technician. Appellant accepted the position on May 18, 2007.

In its September 6, 2007 decision, the Office found that appellant successfully performed the modified letter carrier technician position for 60 days beginning May 18, 2007. However, the record does not indicate when appellant began work. An August 22, 2007 letter from the employing establishment states that appellant had a light-duty assignment. However, the letter does not indicate when appellant began that job or that it was the same position she accepted on May 18, 2007. A September 6, 2007 e-mail message confirms the pay rate for the offered position as of May 18, 2007. But the message does not state when appellant began work or that she had worked for 60 days. The Board notes that there is no report of termination of disability (Form CA-3), pay stubs, timekeeping records or other evidence establishing that appellant began work on May 18, 2007 or had performed the job for 60 days prior to September 6, 2007. The Board therefore finds that the Office failed to follow its accepted procedures as it did not establish that appellant had performed the modified letter carrier technician position for 60 days.[15] As the Office failed to meet its burden in this case, the wage-earning capacity determination must be reversed.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act[16] provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a mater which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[17] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[18]

The standards for evaluation of the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors should be considered together in evaluating the degree of permanent impairment.[19] Chapter 17

[15] *Amalia Stys* (Docket No. 96-521, issued June 9, 1998) (where the Board found that as the claimant was terminated after 56 days of employment, she did not have 60 days of actual wages from which the Office could derive a fair and reasonable representation of her wage-earning capacity).

[16] 5 U.S.C. §§ 8101-8193.

[17] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[18] *See* FECA Bulletin No. 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, be based on the fifth edition of the A.M.A., *Guides* effective February 1, 2001).

[19] *See Paul A. Toms*, 28 ECAB 403 (1987).

of the A.M.A., *Guides* sets forth the grading schemes and procedures for evaluating impairments of the lower extremities.[20]

For lower extremity impairments due to meniscectomies, Table 17-1, page 525 of the A.M.A., *Guides*[21] directs the clinician to utilize section 17.2j, beginning at page 545,[22] as the appropriate method of impairment assessment. Section 17.2j, entitled "Diagnosis-Based Estimates," instructs the clinician to assess the impairment using the criteria in Table 17-33 at page 546, entitled "Impairment Estimates for Certain Lower Extremity Impairments."[23] According to Table 17-33, a partial medial meniscectomy is equivalent to a two percent impairment of the lower extremity.[24] Additional percentages of impairment are awarded for laxity of the cruciate or collateral ligaments.[25]

ANALYSIS -- ISSUE 2

Appellant claimed a schedule award pursuant to an accepted fracture, sprain and internal derangement of the right knee. She submitted a May 24, 2006 report from Dr. Gao, an attending physician Board-certified in occupational medicine. Dr. Gao noted appellant's history of patellofemoral changes with an arthritic syndrome in July 2005, prior to the accepted August 13, 2005 injury. He also mentioned appellant's November 3, 2005 meniscectomy. Dr. Gao referred to the fifth edition of the A.M.A., *Guides* but did not offer a final percentage of impairment for the right leg. On review of Dr. Gao's findings, an Office medical adviser opined that he could not accurately calculate a schedule award without obtaining the July 2005 x-ray report and November 2005 operative report. Following a second opinion examination, the Office returned the updated record to the same Office medical adviser. In an August 19, 2007 report, the medical adviser calculated a 24 percent impairment of the right lower extremity. However, he noted that this rating was calculated without the x-ray and operative reports he previously requested. The Office based the September 6, 2007 schedule award on the Office medical adviser's assessment of a 24 percent impairment.

The Board finds that the Office improperly relied on the Office medical adviser's opinion. The medical adviser explained that he could not accurately calculate a schedule award without the July 2005 x-ray report and November 2005 surgical report. Although the adviser later offered an impairment rating, he noted that it was made without benefit of the requested records. Thus, the Office accorded the weight of the medical evidence to an opinion based on an incomplete medical record. It is well established that medical opinion based on an incomplete or inaccurate medical history is of diminished probative value.[26] The case will be remanded to the

[20] A.M.A., *Guides*, Chapter 17, "The Lower Extremities," pp. 523-561 (5th ed. 2001).

[21] *Id.* at 525, Table 17-1 (5th ed., 2001).

[22] *Id.* at 545.

[23] *Id.* at 546, Table 17-33.

[24] *Id*.

[25] *Id*.

[26] *James R. Taylor*, 56 ECAB 537 (2005).

Office for further development on the schedule award issue. The Office will conduct appropriate development to determine the percentage of permanent impairment to appellant's right lower extremity. Following such development as the Office deems necessary, the Office will issue an appropriate decision in the case.

CONCLUSION

The Board finds that the Office did not properly find that the position of modified letter technician properly represented her wage-earning capacity. The Board further finds that the schedule award issue is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 6, 2007 regarding appellant's wage-earning capacity is reversed. The decision of the Office dated September 6, 2007 regarding the schedule award is set aside and the case remanded for further development consistent with this opinion.

Issued: May 13, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board