# United States Department of Labor
# Employees' Compensation Appeals Board

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| **C.M., Appellant** | ) | |
| **and** | ) | **Docket No. 08-221** |
| | ) | **Issued: May 8, 2008** |
| **DEPARTMENT OF THE ARMY, DIRECTORATE OF CONTRACTING, Fort Dix, NJ, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On October 30, 2007 appellant filed a timely appeal from the May 30, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed her schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

### ***ISSUE***

The issue is whether appellant has more than a 20 percent permanent impairment of her right lower extremity.

### ***FACTUAL HISTORY***

On November 13, 1989 appellant, then a 32-year-old purchasing agent, tripped over a drain in the restroom and fell on her right knee. The Office accepted her claim for fracture and dislocation of the right patella. Appellant underwent arthroscopic surgery on January 23, 1990.

A conflict in medical opinion arose on the issue of permanent impairment. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.

On October 7, 2003 Dr. Glenn related appellant's history of injury and medical treatment. He reviewed the operative report from 1990 and noted that the surgeon did not describe a fracture of the patella in the strict sense, but rather fissure fractures and degenerative changes involving the medial and lateral patella, lateral tibial plateau and lateral femoral condyle. Dr. Glenn described appellant's present complaints and his findings on physical examination. He noted about a 15 degree valgus attitude bilaterally and a range of motion from 0 degrees extension through 95 degrees flexion. Radiographs showed significant degenerative changes involving the articular surface of the patella with significant diminution of the patellofemoral joint space. There was also a two millimeter cartilage interval between the femoral condyle and tibial plateau. Dr. Glenn determined that appellant had a four percent impairment of the whole person due to loss of motion and an eight percent impairment of the whole person due to joint space narrowing in the tibiofemoral joint. Because these impairments may not be combined, he concluded that appellant had an eight percent impairment of the right lower extremity due to joint space narrowing.

On November 3, 2003 an Office medical adviser reviewed Dr. Glenn's findings and reported that appellant had a 10 percent impairment of the right lower extremity due to loss of motion and a 20 percent impairment due to joint space narrowing. He noted that these ratings may not be combined.

On April 5, 2005 the Office issued a schedule award for a 20 percent total impairment of the right lower extremity.[1] The Office reissued the decision on October 11, 2006,[2] and an Office hearing representative affirmed on May 30, 2007.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act[3] 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[4]

[1] Appellant previously received a schedule award for a 15 percent impairment, so the Office awarded compensation for an additional 5 percent.

[2] On a prior appeal, the Board found that the Office did not send its April 5, 2005 decision to the representative's correct address. Docket No. 06-576 (issued July 24, 2006).

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001, the Office began using the A.M.A., *Guides* (5th ed. 2001).

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.[5] When there exist 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 upon a proper factual background, must be given special weight.[6] When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[7]

## ***ANALYSIS***

According to Table 17-10, page 537 of the A.M.A., *Guides*, knee flexion of 95 degrees represents a 10 percent impairment of the lower extremity.[8] Extension to zero degrees (no flexion contracture) represents no impairment. According to Table 17-31, page 544, a roentgenographically determined cartilage interval of two millimeters in the knee joint represents a 20 percent impairment of the lower extremity and, according to the cross-usage chart found at Table 17-2, page 526, impairment due to loss of motion may not be combined with impairment due to arthritis or degenerative joint disease. So the Office issued a schedule award for the larger of the two, namely, the 20 percent impairment due to the cartilage interval in appellant's tibiofemoral joint.

Appellant's attorney has noted two problems with this award. First, Dr. Glenn reported significant degenerative changes involving the articular surface of the patella with significant diminution of the patellofemoral joint space, but he did not report a cartilage interval for this joint under Table 17-31, page 544 of the A.M.A., *Guides*. His evaluation of arthritis impairment is therefore incomplete. If he obtained a true lateral view, Dr. Glenn may simply report the cartilage interval for the patellofemoral joint from the existing x-ray. If additional studies are needed (the A.M.A., *Guides* requires either a "sunrise" or true lateral view), the Office shall make proper arrangements.

Second, Dr. Glenn reported a valgus deformity of 15 degrees. According to Table 17-10, page 537 of the A.M.A., *Guides*, this represents a 20 percent impairment of the lower extremity. He should clarify whether this impairment preexisted appellant's 1989 employment injury.[9] If

[5] 5 U.S.C. § 8123(a).

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

[7] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[8] Although the A.M.A., *Guides* also provides impairment figures for the whole person, the Act does not authorize the payment of schedule awards for the permanent impairment of the whole person. *Ernest P. Govednick*, 27 ECAB 77 (1975). Payment is authorized only for the permanent impairment of specified members, organs or functions of the body, including the leg or lower extremity.

[9] It is well established that preexisting impairments to the scheduled member are to be included when determining entitlement to a schedule award. *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983).

so, the Office must compare appellant's impairment under Table 17-10, page 537 (both loss of flexion and valgus deformity) to her impairment under Table 17-31, page 544 (both knee and patellofemoral joints) and must base her schedule award on the larger of the two. The Board will set aside the Office hearing representative's May 30, 2007 decision and will remand the case for a supplemental report from the impartial medical specialist and an appropriate final decision on appellant's permanent impairment.

Appellant's attorney made other arguments on appeal that lack merit. He suggested that the Office did not select Dr. Glenn from the Physician's Directory System (PDS), as required, but page 490 of the imaged record shows that the Office did use the PDS appointment schedule and appellant's zip code to select an appropriate physician to resolve the conflict. Appellant's attorney also argued that an 8 percent whole person impairment, which Dr. Glenn reported for the joint space narrowing in the tibiofemoral joint, could be converted to a 21 percent impairment of the lower extremity using Table 17-3, page 527 of the A.M.A., *Guides*. This would be one percent more than the Office determined, but Table 17-3, used properly, converts lower extremity impairments to whole person impairments, not the other way around. It shows that a 20 percent lower extremity impairment, taken from Table 17-31, page 544 of the A.M.A., *Guides*, converts to an 8 percent whole person impairment, which the Act does not authorize.

## ***CONCLUSION***

The Board finds that this case is not in posture for decision. A supplemental report from the impartial medical specialist is required.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the May 30, 2007 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: May 8, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board