United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 08-1207**
	)	**Issued: November 3, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Wilmington, DE, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated October 3, 2007. Under 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 a five percent permanent impairment of her left lower extremity.

FACTUAL HISTORY

Appellant, a 32-year-old letter carrier, injured her left knee on November 25, 2005 when she fell while walking up steps. She filed a claim for benefits, which the Office accepted for torn medial meniscus of the left knee.

Appellant underwent arthroscopic surgery for a partial medial meniscectomy of the left knee on April 19, 2006.

In a report dated October 12, 2006, Dr. David Weiss, an osteopath, found that appellant had a 24 percent impairment of the left lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) [A.M.A., *Guides*]. He based this rating on a 4/5 motor strength deficit for the left quadriceps pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*; a 4/5 motor strength deficit for the left gastronecmius pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*; and a three percent impairment for pain under Table 18-1 at page 574 of the A.M.A., *Guides*.

On January 9, 2007 appellant filed a Form CA-7 claim for a schedule award based on loss of use of her left lower extremity.

In a report dated December 13, 2006, an Office medical adviser recommended that appellant be accorded a two percent impairment for a partial meniscectomy pursuant to Table 17-33 at page 546 of the A.M.A., *Guides* and a three percent impairment for pain under Table 18-1 at page 574 of the A.M.A., *Guides*. He stated:

> "According to the A.M.A., *Guides*, assignment for weakness is less reliable than objective anatomic parameters. In addition, where there are other methods of calculation, they should be utilized. Because of the subjective nature and the conscious and unconscious control over this method of testing, it is not the desired methodology.
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> "In addition, there is no atrophy noted in the quadriceps musculature, which would be the anticipated area of atrophy following knee surgery. The gastrocnemius atrophy that is noted would not be typically associated with knee surgery. Instead, quadriceps atrophy would be and that had no atrophy.
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> "In addition, [appellant] is working full active duty, and therefore, it is questionable whether or not the motor strength deficit as quoted by Dr. Weiss using Table 17-8, page 532 for quadriceps and gastroc, knee extension and ankle plantar flexion 12 percent each should be utilized.
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> "In view of the lack of atrophy of the quadriceps and [appellant's] full activity level, I would not recommend that we accept the recommendations for schedule award for weakness unless the case is referred for a second opinion and an independent medical evaluation where the strength testing is further evaluated."

In order to evaluate the extent of permanent impairment stemming from appellant's accepted left knee condition, the Office referred her for a second opinion examination with Dr. Robert A. Smith, Board-certified in orthopedic surgery. In a February 12, 2007 report, Dr. Smith found that appellant had a five percent impairment of the left lower extremity pursuant to the A.M.A., *Guides*. He accorded a three percent impairment for a meniscectomy pursuant to Table 17-33 at page 546 of the A.M.A., *Guides* and a three percent impairment for pain under Table 18-1 at page 574 of the A.M.A., *Guides*. Dr. Smith stated:

> "It does not appear appropriate to rate [appellant] under the strength method since there is no demonstrable nerve or muscle injury that would account for the

observed loss of strength during the examination which is in my opinion due to her pain complaints."

On March 5, 2007 the Office granted appellant a schedule award for a five percent permanent impairment of the left lower extremity for the period October 12, 2006 to January 20, 2007, for a total of 14.4 weeks of compensation.

By letter dated March 14, 2007, appellant's attorney requested an oral hearing, which was held on July 14, 2007.

By decision dated October 3, 2007, the Office denied modification of the February 6, 2006 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[2] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to insure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[3]

ANALYSIS

The Board finds that the case is not in posture for decision.

In the present case, there was disagreement between the Office's second opinion physician, Dr. Smith, and Dr. Weiss regarding the degree of impairment in her left lower extremity to which appellant was entitled due to her work-related condition. Both Dr. Weiss and Dr. Smith submitted impairment ratings and evaluations which were thorough and rationalized. While both physicians relied on Table 18-1 to rate a 3 percent impairment for pain, Dr. Weiss relied on lower extremity muscle weakness of the left quadriceps and left gastrocnemius, plus 3 percent for pain, to render a 24 percent impairment;[4] in contrast, Dr. Smith derived a 3 percent impairment for partial meniscectomy pursuant to Table 17-33 pursuant to Table 17-10, in addition to 3 percent for pain for a total 5 percent impairment. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician,

[1] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[2] 5 U.S.C. § 8107(c)(19).

[3] 20 C.F.R. § 10.404.

[4] The Board notes that Dr. Weiss incorrectly calculated a total 27 percent impairment for atrophy by combining a 12 percent impairment for atrophy of the left quadriceps and a 12 percent impairment for atrophy of the left gastrocnemius.

also know as an "impartial medical examiner."[5] It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. As the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with its procedures, to resolve the outstanding conflict in medical evidence regarding the appropriate percentage of impairment in appellant's left lower extremity. On remand, the Office should instruct the impartial medical specialist to clearly indicate the specific background upon which he based his opinion. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2007 decision of the Office of Workers' Compensation Programs be set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 3, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[5] Section 8123(a) of the Act provides in pertinent part, "[I]f there is a 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).