

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

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**W.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Wilmington, DE, Employer**

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**Docket No. 09-1043  
Issued: November 10, 2009**

*Appearances:*

*Jeffrey P. Zeelander, 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 March 12, 2009 appellant filed a timely appeal from the February 3 and 27, 2009 schedule award decisions of the Office of Workers' Compensation Programs. 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 five percent impairment of his right lower extremity.

**FACTUAL HISTORY**

Appellant, a 53-year-old letter carrier, injured his right knee on December 17, 2004 when he struck it against a mail tray. The Office accepted his claim for sprain/strain of the right knee.

In a report dated May 16, 2005, Dr. Muhammad Kamali, Board-certified in orthopedic surgery, noted that appellant had previously experienced difficulties with his right knee about 10 years prior, when he underwent a partial medial meniscectomy. He noted the recent history of injury and advised that appellant complained of pain in the lateral aspect of his right knee. Since

conservative measures had not helped appellant's condition, Dr. Kamali recommended arthroscopic evaluation and a partial meniscectomy. Appellant underwent arthroscopic surgery for chondroplasty of the medial femoral condyle and chondroplasty of the femoral groove on October 4, 2005. The surgery was performed by Dr. Kamali.

On November 21, 2005 appellant filed a claim for a schedule award based on loss of use of his right leg.

In a December 7, 2005 postoperative report, Dr. Kamali noted complaints of pain in the anterior and anteromedial aspect of the right knee. He stated that appellant's knee became painful after a prolonged period of sitting but improved somewhat after he moved around. Dr. Kamali noted no swelling on examination and full range of knee motion, with occasional, minimal clicking and no laxity. He diagnosed chondromalacia of the right knee and advised appellant to avoid excess activities. In a June 20, 2007 report, Dr. Kamali stated that appellant had reached maximum medical improvement.

By decision dated August 20, 2007, the Office denied appellant's claim for a schedule award. It found that the medical evidence did not establish that he sustained any employment-related permanent impairment.

In a December 11, 2007 report, Dr. Kamali stated that appellant had full active and passive range of motion with pain occurring with changes of weather and full flexion. In a report dated February 6, 2008, he advised that appellant had 10 percent impairment of the right leg due to his 2004 work injury.

On February 11, 2008 appellant requested reconsideration.

By decision dated April 3, 2008, the Office denied modification of the August 20, 2007 decision.

By letter dated November 5, 2008, appellant's attorney requested reconsideration. In a September 11, 2008 report, Dr. David Weiss, an osteopath, found that appellant had a 15 percent impairment of the right 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 right quadriceps, based on manual muscle testing, pursuant to Table 17-8 at page 532 of the A.M.A., *Guides*, for a 12 percent right lower extremity impairment. Dr. Weiss added three percent impairment for pain under Table 18-1 at page 574 of the A.M.A., *Guides*.

On February 3, 2009 an Office medical adviser found that appellant had five percent impairment for patellofemoral pain and crepitation pursuant to Table 17-31 at page 544 of the A.M.A., *Guides, Arthritis Impairments based on Roentgenographically Determined Cartilage Intervals*. He rejected Dr. Weiss' impairment rating based on manual muscle testing of the quadriceps, noting that section 17.2(e) at page 531 of the A.M.A., *Guides*, indicated that such testing depended on the examinee's cooperation and conscious or unconscious control, and that other methods should be considered. The Office medical adviser also stated that a one centimeter difference in thigh circumference was within the range of error. He also noted that

the three percent award for pain was inapplicable to appellant pursuant to section 18.3 at page 570 of the A.M.A., *Guides*.

By decision dated February 3, 2009, the Office granted appellant a schedule award for five percent right lower extremity impairment.

On February 27, 2009 the Office granted appellant a schedule award for a five percent permanent impairment of the right lower extremity for the period September 11 to December 20, 2008, for a total of 14.40 weeks of compensation.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>1</sup> sets 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.<sup>2</sup> 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 ensure 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.<sup>3</sup>

### **ANALYSIS**

The Board finds that the case is not in posture for decision as further development of the medical evidence is warranted.

Appellant's claim was accepted for injury to his right knee. In support of his claim for a schedule award, he submitted the report of Dr. Weiss who rated the extent of impairment as 15 percent. He found that, under Table 17-8, page 532, appellant had 12 percent impairment based on Grade 4 lower extremity muscle weakness in knee extension.<sup>4</sup> To this impairment, Dr. Weiss added three percent impairment for pain under Chapter 18. The Board notes that Table 17-2, the cross-usage chart at page 526, provides that if impairment is rated in terms of loss of strength it cannot be combined with pain. Moreover, Chapter 18 provides that medical examiners should not use that chapter to rate pain-related impairment for any condition that can be adequately rated under the other chapters of the A.M.A., *Guides*.<sup>5</sup> For these reasons, the report of Dr. Weiss does not establish more than 12 percent impairment based on muscle strength loss.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>2</sup> *Id.* at § 8107(c)(19).

<sup>3</sup> 20 C.F.R. § 10.404.

<sup>4</sup> The Board notes that, at page 531, the A.M.A., *Guides* provide that manual muscle testing may be unreliable as it depends on the cooperation of the individual being examined. Individuals whose performance is inhibited by pain or the fear of pain are not good candidates for this method of evaluation.

<sup>5</sup> Page 571.

The Office medical adviser reviewed the evidence and determined that appellant had five percent impairment under Table 17-31, page 544, for arthritis of the right knee.<sup>6</sup> He noted that the surgical report of Dr. Kamali did not support a finding of a torn medial meniscus. However, the Board notes that the surgical report noted a prior history of a medial meniscectomy with a partial meniscectomy. It does not appear that any consideration was given to appellant's preexisting impairment to the right knee in making the schedule award.<sup>7</sup> He also advised that manual muscle strength testing was not an appropriate basis on which to rate appellant's right leg impairment.

The Board will remand the case to the Office for further medical development. The Office should refer appellant to a second opinion specialist to determine the best method under Chapter 17 by which his impairment may be rated in conformance with Table 17-2. As part of this consideration, the physician should give consideration to appellant's preexisting right knee impairment. After such further development as the Office deems necessary, it shall issue a *de novo* decision on the extent of impairment to appellant's right knee.

### **CONCLUSION**

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

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<sup>6</sup> The footnote to Table 17-31 provides five percent impairment in cases of individuals with a history of direct trauma to the knee and crepitation on physical examination without joint space narrowing on x-ray.

<sup>7</sup> It is well established that preexisting impairments to a scheduled member are to be included in determining entitlement to compensation under a schedule award. See *Carol A. Smart*, 57 ECAB 340 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27 and 3, 2009 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further action consistent with this decision of the Board.

Issued: November 10, 2009  
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