United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 07-1400**
	)	**Issued: December 21, 2007**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wilmington, DE, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 20, 2007 merit decision regarding a schedule award. 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 met her burden of proof to establish that she has more than a two percent permanent impairment of her right leg, for which she received a schedule award.

FACTUAL HISTORY

On August 25, 2005 appellant, then a 57-year-old information receptionist, filed a traumatic injury claim alleging that she sustained right knee and left hand and shoulder injuries on August 10, 2005 when she fell in a parking lot at work. She stopped work on August 11, 2005. Appellant attempted to work on August 15, 2005 but stopped work shortly thereafter due to pain in her right knee.

The findings of the September 21, 2005 magnetic resonance imaging (MRI) scan testing of appellant's right knee showed a tear through the horizontal horn of the medial meniscus with absence of a small portion of the inferior half of the posterior horn and advanced degenerative changes which were worse in the medial compartment. The findings also showed that appellant's right lateral meniscus was intact. Dr. Victor R. Kalman, an attending osteopath, determined that appellant sustained a medial meniscus tear of her right knee due to the August 10, 2005 fall. The Office accepted that appellant sustained a right medial meniscus tear and paid compensation for periods of disability. On January 13, 2006 Dr. Kalman performed partial right medial and lateral meniscectomies. The surgery was authorized by the Office.[1]

On February 22, 2006 appellant filed a claim alleging that she was entitled to a schedule award due to her accepted employment injury. In March 2006 appellant returned to limited-duty work at the employing establishment for four hours per day. On May 3, 2006 Dr. Kalman stated with regard to appellant's right knee that there was no effusion, that range of motion was to 125 degrees and that there was no laxity with varus and valgus stress. He indicated that appellant had some mild medial joint and patella facet tenderness.[2] In several reports dated between mid and late 2006, Dr. Kalman provided similar assessments of appellant's right knee condition.

On July 6, 2006 Dr. Richard I. Zamarin, an attending Board-certified orthopedic surgeon, indicated that on examination of the right knee appellant exhibited full range of motion and had no effusion or ligamentous laxity. He noted that she reported tenderness along the medial joint line. Dr. Zamarin indicated that he could not provide an impairment rating for a partial medial meniscectomy or arthritis because he did not have radiographs to review in order to measure the joint spaces. He stated that appellant reported to him that she "uses the cane all day and she ambulated with a slight antalgic gait." Dr. Zamarin stated that under Table 17-5 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) appellant had a 20 percent impairment due to gait derangement (as she fell under the moderate severity category) which translated into a 50 percent impairment of the right leg under Table 17-3 of the A.M.A., *Guides*.[3]

In early September 2006, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon who served as an Office district medical adviser, reviewed the medical evidence of record. He concluded that appellant reached maximum medical improvement on July 6, 2006 and that she had a two percent permanent impairment of her right leg due to her partial medial meniscectomy under Table 17-33 of the A.M.A., *Guides*.[4] Dr. Berman indicated that the impairment percentages contained in Table 17-5 of the A.M.A., *Guides* were for full-time gait derangements

[1] Dr. Kalman indicated that appellant previously had arthroscopic right knee surgery in August 2000 but he did not provide any further details regarding the nature of the surgery.

[2] In form reports dated January 25, March 29 and May 3, 2006, Dr. Kalman continued to indicate that appellant sustained a right medial meniscus tear due to the August 10, 2005 employment injury.

[3] Dr. Zamarin also provided a discussion of appellant's left shoulder impairment, but this matter is not currently before the Board as the record does not contain any final decision regarding a left shoulder impairment. *See* 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

[4] Dr. Berman inadvertently mentioned appellant's left knee several times in his report but clearly was referring to the condition of her right knee.

of persons who are dependent on assistive devices and that, whenever possible, an evaluator should use a method which is more specific than gait derangement to rate lower extremity impairment. He noted that it was not appropriate for Dr. Zamarin to make an impairment rating under Table 17-5 as he had a more specific method of impairment rating available to him, *i.e.*, rating for her right partial medial meniscectomy.[5]

On September 24, 2006 Dr. Zamarin indicated that he had reviewed Dr. Berman's assessment and stated that it was appropriate for him to provide an impairment rating based on gait derangement because appellant "uses a cane all day long for ambulation." He again stated that he would not provide an impairment rating for a partial medial meniscectomy or arthritis because he did not have radiographs to review.

In an April 20, 2007 award of compensation, the Office granted appellant a schedule award for a two percent permanent impairment of her right leg. The award ran for 5.76 weeks from July 26 to August 15, 2006.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[6] and its implementing regulations[7] set 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.[8] It is well-established that in determining the amount of a schedule award for a member of the body that sustained an employment-related permanent impairment, preexisting impairments of the body are to be included.[9]

The text accompanying Table 17-5 of the A.M.A., *Guides*, entitled "Lower Limb Impairment Due to Gait Derangement," provides that the percentages contained in the table are for full-time gait derangements of persons who are dependent on assistive devices. The text further explains that, whenever possible, an evaluator should use a method which is more specific than gait derangement to rate lower extremity impairment.[10]

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[5] Dr. Berman indicated that it did not appear that appellant used an assistive device.

[6] 5 U.S.C. § 8107.

[7] 20 C.F.R. § 10.404.

[8] *Id*.

[9] *See Dale B. Larson*, 41 ECAB 481, 490 (1990); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3.b. (June 1993). This portion of Office procedure provides that the impairment rating of a given scheduled member should include "any preexisting permanent impairment of the same member or function."

[10] *See* A.M.A., *Guides* 529, Table 17-5.

ANALYSIS

The Office accepted that appellant sustained a right medial meniscus tear. On January 13, 2006 Dr. Kalman, an attending osteopath, performed a partial right medial meniscectomy. In an April 20, 2007 award of compensation, the Office granted appellant a schedule award for a two percent permanent impairment of her right leg.

The Board finds that Dr. Berman, a Board-certified orthopedic surgeon who served as an Office district medical adviser, properly determined that appellant had a two percent permanent impairment of her right leg. He reviewed the medical evidence of record and correctly concluded that appellant had a two percent impairment of her right leg due to the partial medial meniscectomy which was performed on January 13, 2006.[11]

The Board notes that appellant would not be entitled to an impairment rating for her right leg due to her partial lateral meniscectomy. On January 13, 2006 Dr. Kalman performed partial right medial and lateral meniscectomies and, although the surgery was authorized, it has only been accepted that appellant sustained a right medial meniscus tear on August 10, 2005. There is no indication in the record that appellant sustained an employment-related right lateral meniscus condition on August 10, 2005 and Dr. Kalman consistently indicated that she only sustained a right medial meniscus condition on that date. Moreover, there is no indication that appellant had any preexisting impairment related to her right lateral meniscus such that an impairment rating for her partial right lateral meniscectomy should be included per Table 17-33 of the A.M.A., *Guides*.[12] The conclusion that appellant did not sustain a right lateral meniscus injury on August 10, 2005 or sustain such an injury prior to that date is supported by findings of September 21, 2005 MRI testing which show that her right lateral meniscus was intact at that time.

The record also contains July 6 and September 24, 2006 reports in which Dr. Zamarin, an attending Board-certified orthopedic surgeon, indicated that under Table 17-5 of the A.M.A., *Guides* appellant had a 20 percent impairment due to gait derangement (as she fell under the moderate severity category) which translated into a 50 percent impairment of the right leg under Table 17-3 of the A.M.A., *Guides*.[13] However, the opinion of Dr. Zamarin is of limited probative value in that he failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.[14] As noted by Dr. Berman, the text accompanying Table 17-5 provides that, whenever possible, an evaluator should use a more specific method of rating lower extremity impairment than gait derangement and a more specific

[11] *See* A.M.A., *Guides* 546, Table 17-33. There is no indication that appellant had any other ratable impairments due to strength, motion or pain deficits. Appellant consistently exhibited normal range of motion of the right knee and there is no evidence that she had significant pain or weakness after reaching maximum medical improvement. *See generally id.* at 531-37, 550-53, 565-86.

[12] *See supra* notes 9 and 11 and accompanying text.

[13] *See* A.M.A., *Guides* 527, 529, Tables 17-3, 17-5.

[14] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

method of impairment rating was available, *i.e.*, rating for appellant's right partial medial meniscectomy. Although it appears that appellant may have chosen to use a cane, Dr. Zamarin did not explain how she would have been medically dependent on an assistive device on a full-time basis.[15]

As the report of the Dr. Berman provided the only evaluation which conformed with the A.M.A., *Guides*, it constitutes the weight of the medical evidence.[16] Appellant has not shown that she has more than a two percent permanent impairment of her right leg.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she has more than a two percent permanent impairment of her right leg, for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 20, 2007 decision is affirmed.

Issued: December 21, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

[15] *See supra* note 10 and accompanying text.

[16] *See Bobby L. Jackson*, 40 ECAB 593, 601 (1989).