

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

SHERRY L. HURSEY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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**Docket No. 05-540
Issued: September 8, 2005**

Appearances:
Sherry L. Hursey, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 29, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit schedule award decision dated November 22, 2004. 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 10 percent impairment of her right lower extremity and 7 percent impairment of her left lower extremity for which she received schedule awards.

FACTUAL HISTORY

On June 26, 2002 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that she developed a meniscal tear in her right knee, synovitis and traumatic chondromalacia due to factors of her federal employment. The Office accepted appellant's claim for chondromalacia of the left knee, internal derangement and tear of the lateral meniscus of the right knee.

On October 29, 2002 Dr. Rida Azer, a Board-certified orthopedic surgeon, performed an arthroscopy on appellant's right knee with a partial medial meniscectomy and a partial lateral meniscectomy as well as a partial synovectomy, joint debridement and shaving of the patella.

Appellant requested a schedule award on September 5, 2003. In a report dated October 17, 2003, Dr. Azer rated appellant's permanent impairment in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He noted appellant's continued complaints of persistent pain in both knees more in the right than the left. Dr. Azer found that appellant walked with a limp in her right lower extremity, a seven percent impairment. He found minimal atrophy of the right lower extremity of 1 to 1.5, as well as a Grade 4 impairment of both lower extremities in strength testing for 12 percent impairment. Dr. Azer noted that appellant had no loss of range of motion. He found that due to the partial meniscectomies medial and lateral on the right appellant had 10 percent impairment of her right lower extremity. Dr. Azer examined x-rays showing that appellant had joint cartilage loss with three millimeters remaining, seven percent impairment of each of her lower extremities. He concluded that appellant had 54 percent impairment of her right lower extremity and 19 percent impairment of her left lower extremity.

The Office referred appellant's claim to the Office medical adviser for review on January 22, 2004. He provided a diagnosis-based estimate of 10 percent to the right knee due to the partial meniscectomies. The Office medical adviser stated that there was no basis for an impairment rating to the left lower extremity.

On March 9, 2004 the Office again referred appellant's claim to the Office medical adviser requesting clarification. On March 10, 2004 the Office medical adviser again opined that appellant had only 10 percent impairment of her right lower extremity and no findings supporting permanent impairment of her left lower extremity.

The Office referred appellant for a second opinion evaluation with Dr. Robert Draper, a Board-certified orthopedic surgeon, on April 8, 2004. In a report dated April 29, 2004, Dr. Draper noted appellant's history of injury and medical history. He diagnosed chondromalacia of the left knee and partial meniscectomies and synovectomy of the right knee. Dr. Draper found that appellant had no gait disturbance and that gait disturbance could not be combined with any other category of evaluation. He found that appellant's right thigh was larger than her left and that she was therefore not entitled to an impairment rating for atrophy. Dr. Draper found that appellant had no impairment rating for her left knee as she had no ratable loss of range of motion or atrophy. He concluded that appellant had 10 percent impairment of her right knee due to her meniscectomies.

The Office found a conflict of medical opinion evidence and referred appellant to Dr. Roger Raiford, a Board-certified orthopedic surgeon, for a referee examination. In a report dated September 30, 2004, Dr. Raiford noted appellant's history of injury and accepted knee conditions. He examined appellant and found no effusion in either knee and no clinical difference in thigh circumference with no motor or sensory deficits. Dr. Raiford examined appellant's knee x-rays and found that she had three millimeters of joint space medially bilaterally and five millimeters laterally bilaterally. He found that due to appellant's accepted condition of chondromalacia of the left knee she had only a three millimeter cartilage interval

equivalent to seven percent impairment of the left knee. Dr. Raiford found that appellant had 10 percent impairment of her right knee due to partial lateral and medial meniscectomies. He concluded that appellant reached maximum medical improvement on October 29, 2003.

By decision dated November 22, 2004, the Office granted appellant a schedule award for 7 percent impairment of her left lower extremity and 10 percent impairment of her right lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² sets 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 American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

The Act provides that, if 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.³ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁴

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.⁵

ANALYSIS

In this case, the Board finds that there was a conflict of medical opinion evidence between appellant's attending physician, Dr. Azer, a Board-certified orthopedic surgeon, and the Office second opinion physician, Dr. Draper, a Board-certified orthopedic surgeon, regarding the

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ 5 U.S.C. §§ 8101-8193, 8123.

⁴ 20 C.F.R. § 10.321.

⁵ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

extent of appellant's lower extremity impairment for schedule award purposes. Due to this conflict, the Board finds that the Office properly referred appellant for a referee examination with Dr. Raiford, a Board-certified orthopedic surgeon, to determine the extent of her permanent impairment.

In a detailed September 30, 2004 report, Dr. Raiford noted that the Office had accepted appellant's claim for chondromalacia of the left knee and that x-rays demonstrated only a three millimeter cartilage interval. He properly found that in accordance with the A.M.A., *Guides* this was a seven percent impairment of the lower extremity.⁶ Regarding appellant's right knee, Dr. Raiford correctly found that appellant's diagnosis-based impairment rating for partial meniscectomies could not be combined with gait derangement, muscle atrophy, muscle strength deficits or loss of range of motion, none of which were found on physical examination. However, Dr. Raiford also found that appellant had only three millimeter cartilage interval in her right knee, a seven percent impairment of the lower extremity,⁷ but failed to consider this in reaching his impairment rating. The Board notes that the A.M.A., *Guides* provide that arthritis impairments may be combined with diagnosis-based impairment ratings.⁸ Therefore, the case will be remanded to the Office for further consideration of the impairment to appellant's right lower extremity.

CONCLUSION

The Board finds that the Office properly granted appellant a schedule award for 7 percent impairment of her left lower extremity. The Board further finds that the record reflects greater impairment of the right lower extremity than 10 percent awarded. The case is remanded for further consideration of this issue to be followed by a *de novo* decision.

⁶ A.M.A., *Guides* 544, Table 17-31.

⁷ It is well established that in determining entitlement to a schedule award, preexisting impairment to the schedule member is to be included. *Michael C. Milner*, 53 ECAB 446, 450 (2002).

⁸ A.M.A., *Guides*, 526, Table 17-2.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2004 decision the Office of Workers' Compensation Programs is affirmed, in part, and set aside, in part. The case is remanded for further action consistent with this decision of the Board.

Issued: September 8, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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