United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 07-2059**
	)	**Issued: May 21, 2008**
DEPARTMENT OF HOMELAND SECURITY, PHILADELPHIA INTERNATIONAL AIRPORT, Philadelphia, PA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 2, 2007 appellant filed a timely appeal from the August 25, 2006 and February 23, 2007 decisions of the Office of Workers' Compensation Programs denying a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has more than five percent impairment of the right knee, for which she received a schedule award. On appeal, her attorney asserts there is a conflict of medical opinion between an Office medical adviser and her attending physician. Counsel contends that the Office improperly relied on the Office medical adviser to resolve a conflict of medical opinion.

FACTUAL HISTORY

On June 5, 1992 appellant, then a 52-year-old customs inspector, sustained a right knee sprain and chondromalacia of the right patella when she slipped and fell on a wet curb. She underwent right knee arthroscopy on April 23, 1996 to repair a torn lateral meniscus and chondromalacia. The claim was assigned File No. 03-01716541. The Office subsequently accepted a December 10, 1998 right knee contusion sustained when appellant was struck by a jet engine blast.[1] The claim was assigned File No. 03-240081.[2]

Appellant requested a schedule award. She submitted reports from Dr. Roy T. Lefkoe, an attending Board-certified orthopedic surgeon, dated July 30, 2003 to June 27, 2006. Dr. Lefkoe noted limited flexion, synovitis, effusion, chondrocalcinosis, crepitus and chondromalacia of the right knee. He diagnosed degenerative arthritis of the right knee. In a November 17, 2003 report, Dr. Lefkoe stated that he reviewed October 29, 2003 x-rays showing moderate degenerative arthritis of the right knee with joint space narrowing. He did not provide any impairment rating or identify the extent of the joint space cartilage narrowing observed.

In a February 4, 2002 report, Dr. David Weiss, an attending osteopathic physician, reviewed a history of injury and medical treatment. He opined that appellant had reached maximum medical improvement. On examination of the right knee, Dr. Weiss found effusion, crepitation and limited flexion and extension. He rated impairment of the right lower extremity at eight percent. Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*), Dr. Weiss found that appellant had five percent impairment due to patellofemoral pain and crepitance under Table 17-31, page 544,[3] and three percent for pain under Figure 18-1, page 574.[4] He repeated his impairment estimate in a February 24, 2004 report.

By decision dated February 3, 2006, the Office granted appellant a schedule award for a five percent impairment of the right lower extremity. Following additional development, the Office vacated the decision on May 11, 2006 and remanded the case for further development.

On August 7, 2006 the Office referred the medical evidence to an Office medical adviser to assess the percentage of permanent impairment to appellant's right lower extremity. In an August 17, 2006 report, Dr. Arnold T. Berman, the medical adviser, advised that appellant had five percent impairment under Table 17-31, page 544, of the A.M.A., *Guides*. He noted that five

[1] The Office also accepted neck, back and left knee injuries. On October 1, 2002 and December 24, 2003, appellant received scheduled awards for 13 percent impairment of the left lower extremity. The only issue on the present appeal is the percentage of permanent impairment to the right lower extremity.

[2] The claims were combined under No. 03-0176541 as the master file.

[3] A.M.A., *Guides* 544, (fifth edition), Table 17-31 is entitled "Arthritis Impairments Based on Radiographically Determined Cartilage Intervals." A footnote to the table provides that in an individual with a history of direct trauma, a complaint of patellofemoral pain and crepitation may receive a five percent impairment rating without joint space narrowing on x-rays.

[4] *Id*. at 574, (fifth edition), Table 18-1 is entitled "Algorithm for Pain-Related Impairment In Conditions Associated with Conventionally Ratable Impairment."

percent impairment of the right lower extremity was appropriate for patellofemoral pain and crepitation without joint space narrowing on x-rays. The medical adviser explained that it was not appropriate for Dr. Weiss to make an additional rating for pain under Figure 18-1 as Table 17-31 provided a rating for pain.

By decision dated August 25, 2006, the Office found that appellant had not established that she had more than five percent impairment of the right lower extremity. The Office found that Dr. Weiss improperly assessed an additional three percent impairment for pain.

Appellant requested a hearing, held December 11, 2006. Her attorney contended that Dr. Weiss' assessment was proper. Alternatively, the attorney asserted a conflict of medical opinion arose between Dr. Weiss and the Office medical adviser. After the hearing, appellant submitted a statement describing her symptoms. She also submitted progress notes from Dr. Lefkoe dated October 2006 to July 2007, reiterating previous findings.

By decision dated February 23, 2007, an Office hearing representative affirmed the August 25, 2006 decision finding that appellant did not have more than five percent impairment of the right lower extremity. The hearing representative found that the weight of the medical evidence rested with the Office medical adviser. The hearing representative found that there was no conflict of opinion as Dr. Weiss' opinion was diminished by his incorrect application of the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] provides for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.[6] As of February 1, 2001, schedule awards are calculated according to the fifth edition of the A.M.A., *Guides*, published in 2000.[7]

The standards for evaluation the permanent impairment of an extremity under the A.M.A., *Guides* are based on loss of range of motion, together with all factors that prevent a limb from functioning normally, such as pain, sensory deficit and loss of strength. All of the factors

[5] 5 U.S.C. §§ 8101-8193.

[6] *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

[7] *See* FECA Bulletin No. 01-05 (issued January 29, 2001) (schedule awards calculated as of February 21, 2001 should be evaluated according to the fifth edition of the A.M.A., *Guides*. Any recalculations of previous awards which result from hearings, reconsideration or appeals should, however, are based on the fifth edition of the A.M.A. *Guides* effective February 1, 2001).

should be considered together in evaluating the degree of permanent impairment.[8] Chapter 17 of the A.M.A., *Guides* sets forth the grading schemes and procedures for evaluating impairments of the lower extremities.[9]

The fifth edition of the A.M.A., *Guides* allows for an impairment percentage to be increased by up to three percent for pain by using Chapter 18, which provides a qualitative method for evaluating impairment due to chronic pain. If an individual appears to have a pain-related impairment that has increased the burden on his or her condition slightly, the examiner may increase the percentage up to three percent. However, examiners should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[10]

ANALYSIS

The Office accepted that appellant sustained right knee injuries on June 5, 1992 and December 10, 1998. It granted her a schedule award for a five percent permanent impairment of the right lower extremity, based on the opinion of Dr. Berman, an Office medical adviser. He agreed with the rating of five percent impairment to the knee for patellofemoral pain and crepitation made by Dr. Weiss under Table 17-31. The Board notes that Table 17-31 provides that direct knee trauma with patellofemoral pain and crepitation is rated as a five percent impairment of the lower extremity, if there is no joint space narrowing. This rating is in conformance with the A.M.A., *Guides.*

Dr. Weiss also allowed an additional three percent for pain, citing to Figure 18-1, page 574. However, as noted by Dr. Berman, this rating does not conform to the procedures of the Office in making schedule award ratings. The examining physician is cautioned under Chapter 18 of the A.M.A., *Guides*, not to "use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and oral impairment rating systems given in other chapters of the A.M.A., *Guides*."[11] Chapter 18 was formulated to assess impairment due to "excess pain" in the context of verifiable medical conditions that cause pain.[12] In this case, Dr. Weiss properly utilized Table 17-31 to provide a rating for appellant's right knee pain. Having done so, he did not provide any rationale for providing any additional impairment rating for pain conforming to the procedures outlined in Chapter 18. There was no discussion by the physician as to why Table 17-31 did not adequately rate the patellofemoral pain found on examination or how there was any "excess" pain due to the accepted right knee condition. The A.M.A., *Guides* note that an explanation by the examining physician should be provided in writing to support a rating made under Chapter 18. In the absence of such rationale, the three

[8] *See Paul A. Toms*, 28 ECAB 403 (1987).

[9] A.M.A. *Guides* 523-61, (5th ed. 2001) Chapter 17, "The Lower Extremities."

[10] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003); A.M.A., *Guides* 18.3(b); *see also P.C.*, 58 ECAB ___ (Docket No. 07-410, issued May 31, 2007).

[11] A.M.A., *Guides* 571, 18.3b.

[12] *Id*. at 570.

percent rating provided by Dr. Weiss artificially inflated the rating for pain already provided under Table 17-31. It is well established that, when an impairment rating by the examining physician does not conform to the protocols of the A.M.A., *Guides*, the Office may rely on the rating provided by the Office medical adviser.[13] As the impairment rating of Dr. Weiss does not fully comply with the applicable protocols for determining permanent impairment, his opinion is of diminished probative value.

Appellant has not submitted any other medical evidence to establish more than five percent impairment to her right lower extremity. The reports of Dr. Lefkoe, although noting severe joint space narrowing of the right knee, do not provide any description of impairment which may be utilized in this case. He did not describe the nature of any x-ray obtained of the right knee or the extent of any specific cartilage interval loss related to the accepted injury.[14]

CONCLUSION

The Board finds that appellant has no more than five percent impairment to her right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 23, 2007 and August 25, 2006 be affirmed.

Issued: May 21, 2008
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

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.3 (October 1990). *See also Tommy R. Martin*, 56 ECAB 273 (2005).

[14] Chapter 17.2h which rates arthritis noted that any impairment rating of the knee for cartilage interval loss must be based on a "sunrise view" taken at 40 degrees flexion or on a true lateral view. In turn, the physician must specify the extent of loss in millimeters. A.M.A., *Guides* 544.