

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

C.D., Appellant)

DEPARTMENT OF DEFENSE, NATIONAL)
SECURITY AGENCY, Fort Meade, MD,)
Employer)

Docket No. 09-1044
Issued: December 3, 2009

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 12, 2009 appellant filed a timely appeal from the December 10, 2008 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than a seven percent impairment of the left lower extremity for which she received a schedule award.

On appeal, appellant contends that the evidence establishes that she has greater than a seven percent impairment of the left lower extremity, and that she was denied her right to a referee examination.

FACTUAL HISTORY

The Office accepted appellant's January 10, 2001 traumatic injury claim for a closed fracture of the left patella. It approved left knee surgeries for internal fixation of the displaced left patellar fracture and arthroscopic debridement of the left knee.

On March 7, 2005 appellant filed a claim for a schedule award.

Appellant submitted a report dated June 6, 2005 from Dr. Errol L. Bennett, a Board-certified orthopedic surgeon, who provided a history of injury and treatment and noted her complaints of persistent pain in the left knee, as well as swelling, weakness, instability and loss of function. She had intermittent catching and giving way, and a sense of instability in the left knee. Results of Dr. Bennett's range of motion examination of the left knee were as follows: flexion -- 0 to 120 degrees; valgus -- 10 degrees; varus -- 0 degrees; and extension 0 degrees. He found marked and severe crepitation and tenderness to palpation in the patellofemoral joint. X-rays showed significant deformity of the distal patella and severe patellofemoral joint arthritis. Under Tables 17-2 and 17-31 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Bennett opined that appellant had a 20 percent impairment of the left lower extremity. He also opined that the date of maximum medical improvement was June 6, 2005.

The Office forwarded the medical record to the district medical adviser (DMA) for review and an opinion as to the degree of permanent impairment to appellant's left lower extremity. In a September 20, 2006 report, the DMA concluded that appellant had five percent impairment to the left lower extremity for crepitus at the patellofemoral joint, pursuant to Table 17-31 at page 544 of the A.M.A., *Guides*. He also opined that she has had two percent impairment for a partial lateral meniscectomy, pursuant to Table 17-33 at page 546 of the A.M.A., *Guides*, for a total left lower extremity impairment rating of seven percent. The DMA found that the date of maximum medical improvement was December 11, 2002.

On October 12, 2006 the Office informed appellant that it had received the DMA's report, but that it would "need to forward [her] compensation claim to an independent medical examiner (IME) to determine the impairment rating and date of maximum medical improvement." Appellant was asked to advise the Office when she would be available to report for an examination.

The Office referred appellant to Dr. Robert Franklin Draper, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to the degree of permanent impairment of her left lower extremity. In a report dated July 19, 2007, Dr. Draper reviewed the history of appellant's injury and treatment. March 1, 2004 x-rays of the left knee showed evidence of distal patellar deformity and some evidence on two patellar sunrise views of significant patellofemoral arthropathy. March 19, 2004 x-rays showed no evidence of disuse atrophy or osteoporosis. February 5, 2003 x-rays revealed some severe degenerative changes in the patellofemoral area, with some mild to moderate medial joint space narrowing. Examination of the left knee revealed a 20-degree loss of extension and flexion to 130 degrees. Abduction and adduction stress testing revealed no instability. There was some patellofemoral crepitus noted. Dr. Draper diagnosed displaced fracture of left patella (January 9, 2001); status post open reduction and internal fixation of displaced fracture left patella; post-traumatic arthritis involving the left patellofemoral joint; and mild medial joint space. Referring to Table 17-31 of the fifth edition of the A.M.A., *Guides* at page 544, he found a five percent impairment of the left lower extremity for patellofemoral arthritis and crepitus of the left knee. Under Table 17-33 at page 546, Dr. Draper awarded a two percent impairment rating for a partial lateral meniscectomy, for a total impairment rating for the left lower extremity of seven percent. He stated that appellant

was not entitled to an impairment rating for the medial joint space narrowing due to its insignificance and the fact that it was not due to the accepted injury.

By letter dated February 4, 2008, the Office informed appellant that a conflict in the medical evidence existed between the Office's second opinion examiner and her treating physician as to the degree of permanent impairment, and advised her of the necessity for a referee medical examination to resolve the conflict. Appellant was asked to notify the Office 60 days prior to her arrival in the United States, so that an appointment could be scheduled with the impartial medical examiner.

In a letter dated August 25, 2008, appellant informed the Office that she would be retiring from federal service and returning to the United States. She provided her new address and telephone number in Covington, Georgia, effective September 25, 2008, as well as a Maryland telephone number from which she could retrieve messages prior to September 25, 2008. Appellant asked the Office to expedite the scheduling of the appointment with the IME, noting that she would be available any time after October 6, 2008.

On December 10, 2008 the Office granted appellant a schedule award for a seven percent permanent impairment of the left lower extremity. The period of the award was from December 11, 2002 through May 1, 2003. The Office determined that the date of maximum medical improvement was December 11, 2002.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulations² 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 regulations as the appropriate standard for evaluating schedule losses.

Section 8123(a) of the Act provides that, if there is 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 Where 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 a proper factual and medical background, must be given special weight.⁴

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ 5 U.S.C. § 8123(a).

⁴ *Id.*; see also *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

ANALYSIS

The Board finds that this case is not in posture for a decision due to an unresolved conflict in medical opinion between Dr. Draper, the Office's second opinion physician, and appellant's treating physician, Dr. Bennett.

The Office found a conflict of medical opinion between Dr. Draper and Dr. Bennet as to the degree of permanent impairment to appellant's left lower extremity. Dr. Draper found a five percent impairment of the left lower extremity under Table 17-31 of the A.M.A., *Guides* for patellofemoral arthritis and crepitus of the left knee. Under Table 17-33 at page 546, he awarded a two percent impairment rating for a partial lateral meniscectomy, for a total impairment rating of seven percent. Dr. Bennett concluded that appellant had a 20 percent permanent impairment, applying Table 17-31 and 17-2 to his findings of severe crepitation and tenderness to palpation in the patellofemoral joint, severe patellofemoral joint arthritis, and diminished range of motion. Although appellant was advised that a conflict had been identified and that an impartial medical examination would be required in order to resolve it, the Office failed to schedule such an examination and issued its schedule award decision without the benefit of a referee opinion.

The Board notes that appellant properly informed the Office of her new address in Georgia and provided available dates for the impartial medical examination. There is no evidence of record that the Office attempted to contact appellant following her August 25, 2008 informational letter.

The Board finds that there remains an unresolved conflict between the medical opinions of Dr. Draper and Dr. Bennett. Therefore, the case must be remanded to the Office for an impartial medical examination to resolve the conflict as to the degree of permanent impairment to appellant's left lower extremity, followed by an appropriate *de novo* decision.⁵

CONCLUSION

The Board finds that this case is not in posture for decision due to an unresolved conflict in the medical opinion evidence as to the degree of appellant's left lower extremity impairment. On remand, the Office should refer appellant, together with a statement of accepted facts and the case record, to an appropriate impartial medical specialist, for an examination and evaluation in order to resolve the conflict.

⁵ See *supra* note 3 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2008 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this opinion.

Issued: December 3, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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