U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENNIS W. DAVIS and DEPARTMENT OF JUSTICE,
BORDER PATROL, Yuma, AZ

Docket No. 00-1664; Submitted on the Record;
Issued October 9, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant is entitled to schedule awards for greater than 9 percent to his left lower extremity and 22 percent for his right lower extremity.

The Office of Workers' Compensation Programs accepted appellant's claim for a medial meniscal tear to the left knee, right knee internal derangement and surgery on both knees.

In a report dated March 12, 1998, Dr. Alan R. Horowitch, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant had ongoing problems in both knees, used a crutch to "get about," and wore an unloader brace on his right knee. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), he stated:

> "[Appellant's] impairment rating can be based [on] Table 62 [page 83]. There is a three millimeter (mm) cartilage interval about the medial compartments on the right and left knee as evidence by standing x-rays done today. This corresponds to a three percent whole person, seven percent lower extremity impairment on each side, which would give a six percent whole person impairment according to combined tables. I estimate a mild gait derangement, which according to Table 36 [page 76] results in at least a 15 percent whole person impairment.
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> "Today he has full extension and flexion of 115 degrees in both sides. There is no varus or valgus deformity. There is no impairment form range of motion or deformity."

Using Table 64, page 85, Dr. Horowitch found that there was moderate cruciate anterolateral ligament laxity on the left knee and concluded that appellant had a 10 percent whole person impairment and a 25 percent impairment to his left lower extremity. He found that the partial medical meniscectomy of the right knee resulted in a one percent whole person impairment and a two percent lower extremity impairment and the partial meniscectomy of the

left knee resulted in a one percent whole person impairment and a two percent lower extremity impairment.

In a July 8, 1996 report, Dr. Horowitch stated that the range of motion of appellant's right knee on extension was -4 degrees and on flexion was 115 degrees and the range of motion of appellant's left knee was -7 degrees on extension and 131 degrees on flexion. He stated that the circumferential measurements were on the right thigh 20 and on the calf, 16 1/8, on the left thigh 20½ and on the calf 16¾. Using Table 64 of the A.M.A., *Guides* (4th ed. 1994), Dr. Horowitch stated that the standard lower extremity impairment was 2 percent for medial meniscectomy, but due to appellant's arthritis and the minimum loss of 2 millimeters of articular cartilage about the weight bearing portion of the medial femoral condyle, according to Table 62 (page 83), appellant had a 20 percent lower extremity rating. Using the Combined Values Chart, page 323, he determined that appellant had a 22 percent impairment to his right lower extremity.

In a report dated November 27, 1998, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon and referral physician, diagnosed status post right knee arthroscopy with partial medial meniscectomy on January 18, 1996 status post right knee arthroscopy with removal of loose osteochondral fragment and chondroplasty on January 6, 1998 and status post left knee arthroscopy with partial medial meniscectomy and chondroplasty on January 6, 1998. Using the A.M.A., *Guides* (4th ed. 1994), Table 64, page 85, Dr. Harris determined that appellant had a residual impairment from the partial medial meniscectomy of two percent. Using Table 62, page 83, he determined that based on appellant's residual symptoms, arthroscopic findings and x-rays, appellant had residual mild degenerative joint disease of the knee resulting in a seven percent impairment of the left lower extremity. Combining the values of the seven percent impairment from the left lower extremity for post-traumatic arthritis and the two percent impairment of the left lower extremity from the partial medial meniscectomy, Dr. Harris determined that appellant had a total impairment of nine percent to the left lower extremity.

Regarding appellant's right lower extremity, Dr. Harris stated that appellant had previously received a schedule award for a 22 percent impairment based on post-traumatic arthritis and the partial meniscectomy. He noted that appellant subsequently had another injury on November 13, 1997 resulting in a second right knee arthroscopy on January 6, 1998. Dr. Harris stated that at the time of the arthroscopy, appellant had degenerative changes in the right knee without evidence of additional meniscal tears. He stated that based on the operative findings of January 6, 1998 and subsequent x-rays and Dr. Horowitch's March 12, 1998 report, appellant did not have any significant change in the impairment to his right lower extremity and, therefore, the 22 percent impairment remained unchanged. Specifically, Dr. Harris considered that in his July 8, 1996 report, Dr. Horowitch noted that appellant had a two mm loss of cartilage in the right knee and in his March 12, 1998 report, Dr. Horowitch noted that the x-rays at that time showed a three mm cartilage interval. Dr. Harris found that the cartilage interval did not appear to have worsened compared to the July 8, 1996 x-ray films.

By decision dated February 5, 1999, the Office issued appellant an award for a nine percent permanent loss to his left lower extremity.

By decision dated February 8, 1999, the Office found that appellant's impairment to his right lower extremity remained at 22 percent.

In a report dated February 11, 1999, Dr. Horowitch stated that appellant had a minor twist of the right leg the other day and had recurrent severe sharp pain in the medial aspect of the right knee. He stated that this was in addition to the chronic medial joint line pain, which existed on both sides. Dr. Horowitch also stated that appellant felt his knee pain was worsening. He stated that surgery was an option although it was not guaranteed to relieve the pain and in the meantime, Dr. Horowitch prescribed Celebrex.

In a report dated March 4, 1999, Dr. Horowitch stated that appellant had extensive arthrosis about both medial compartments and there was an option of cartilage transplant either osteochondral transplant or chondral harvest to later reimplantation.

In a report dated May 7, 1999, Dr. Horowitch stated that appellant "was in a good deal of pain." He stated that "the pain was greater than that which would typically be associated with a nine percent knee impairment." Dr. Horowitch stated that appellant had objective good range of motion of the knee but there was a good deal of pain with motion.

On May 12, 1999 the Office received two reports from Dr. Horowitch dated April 20 and October 5, 1998. In the April 20, 1998 report, he stated that appellant would ultimately need total knee replacements and Dr. Horowitch did not feel that the "tables" fully indicated the degree of pain appellant felt. In the October 5, 1998 report, he stated that the physical examination showed that appellant had evidence of healed surgical scars about both knees, that there was no effusion and the overall alignment appeared within normal limits. Dr. Horowitch stated that there were palpable osteophytes about both medial compartments. He stated:

> "Circumferential measurement of both thighs is 19 5/8" and both calves 16½." Range of motion is 0 [degrees] to 130 [degrees] on the right side and -3 to 135 [degrees] on the left side. There is no evidence of varus or valgus laxity to either knee; however, the left side does have evidence of 1+ Lachman laxity as well as 1+ anterior drawer. The McMurray test is positive on the right side and mildly positive on the left side."

Dr. Horowitch stated that the x-rays were substantially normal except for some mild joint space narrowing bilaterally at the medial compartments as well as slight irregularity at the medial compartments with sclerosis. He stated that the x-rays did not indicate the severity of the disease found at arthroscopy.

In a report dated June 18, 1999, Dr. Horowitch stated that in view of appellant's ongoing symptoms, he reviewed his March 12, 1998 report. He stated that the x-rays did not show a substantial change since his March 12, 1998 report. Dr. Harris stated that the range of motion also showed no significant change from his prior examination. He stated that disability was as follows:

> "… Whole body impairment only is noted. There is a 3 percent impairment to each knee from x-ray joint space narrowing, a total of 6 percent. He has a 15 percent impairment from gait. This sub-totals to 20 percent using combined values. Add 1 percent for meniscectomy to the left knee and 1 percent for the

right knee for a total of 22 percent. Add 10 percent for left anterior cruciate ligament laxity [yields a] combined value of 31 percent."

Dr. Horowitch concluded that appellant had a 31 percent whole body impairment to both knees. He reiterated that cartilage transplant surgery and total joint replacement was an option.

Appellant requested an oral hearing before an Office hearing representative, which was held on August 2, 1999. At the hearing, appellant stated that he believed he was entitled to greater schedule awards contending that his right knee was worse than when originally injured and his left was as bad as his right knee. He stated the table was unclear to him but he believed the figures added up to "a lot more than nine percent." Appellant stated that the arthritis in his knees was "a constant throb," and his knees hurt whether he sat, stood or lay down. He stated that he was medically retired.

By decision dated October 7, 1999, the Office hearing representative found that the Office's determination that appellant had a 22 percent permanent impairment to his right lower extremity was proper. He found, however, that the nine percent impairment award for appellant's left lower extremity did not take into consideration appellant's reduced range of motion, the Lachman laxity and the anterior drawer. The Office hearing representative, therefore, remanded the case further development on the impairment to appellant's left knee.

In a report dated December 6, 1999, the second opinion physician, Dr. Arthur Platt, a Board-certified orthopedic surgeon, considered appellant's history of injury, noted that appellant underwent x-rays and a magnetic resonance imaging scan and considered appellant's complaints of constant pain in both his medial and lateral knees and intermittent buckling, locking, crepitus and stiffness. He considered that prolonged standing, walking or bending aggravated appellant's pain. On physical examination, Dr. Platt found that regarding appellant's right knee, appellant had a range of motion from 0 to 120 degrees of flexion, was unable to squat and had tenderness over the medial joint line and numbness on the lateral knee. He found crepitus on flexion and extension and weakness of the right quadriceps muscle.

Regarding the left knee, Dr. Platt found that appellant had a range of motion from 0 to 115 degrees, was unable to squat and had tenderness of the medial and lateral joint line. He found crepitus on flexion and extension and weakness of the quadriceps muscle.

Dr. Platt found that the right calf measured 16 1/8, the thigh, 19 1/8 and the left calf measured 16½ and the left thigh, 19 5/8. He found the x-rays showed irregularity of the mediofemoral condyles bilaterally. Dr. Platt concluded that appellant had a loss of lower extremity length of 25 percent.

In a note dated February 17, 2000, the district medical adviser stated that the prior schedule award by Dr. Harris appeared appropriate and encompassed the findings of Dr. Platt in his report. He stated that there appeared to be no additional impairment based on the A.M.A., *Guides*.

By decision dated February 18, 2000, the Office found that appellant was not entitled to an additional schedule award.

The Board finds that appellant has no greater than a 22 percent impairment of his right lower extremity. The case is not in posture for decision regarding appellant's impairment of his left lower extremity.

The schedule award provision of the Federal Employees' Compensation Act[1] provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner by which the percentage loss of a member, function or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.[2] 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.[3]

In his July 8, 1996 report, based in part on the measurements of appellant's range of motion and flexion of the right knee, and the circumference of the right thigh and calf, using Table 64, page 85, of the A.M.A., *Guides* (4th ed. 1994), Dr. Horowitch determined that appellant had a 2 percent impairment for the medial meniscectomy. Using Table 62, page 83, he determined that appellant had a 20 percent impairment due to arthritis and the minimum loss of 2 millimeters of articular cartilage about the weight bearing portion of the medial femoral condyle. Using the combined values chart, page 323, he determined that appellant had a 22 percent impairment to his right lower extremity.

In his November 27, 1998 report, the second opinion physician, Dr. Harris considered that appellant had another injury on November 13, 1997 resulting in a second right knee arthroscopy on January 6, 1998 which showed degenerative changes in the right knee without evidence of additional meniscal tears. Based on his review of the January 6, 1998 operative report and subsequent x-rays in Dr. Horowitch's March 12, 1998 report, he concluded that appellant did not have any significant change in the impairment to his right lower extremity and therefore the 22 percent impairment remained unchanged. He specifically noted that appellant's loss of cartilage in his knee in the March 12, 1998 report had not worsened compared to the July 8, 1996 x-rays. Dr. Horowitch properly used the A.M.A., *Guides* (4th ed. 1994) in determining that appellant had a 22 percent impairment to his right lower extremity. Dr. Harris concurred with his findings. Appellant has therefore not established that he has more than a 22 percent impairment of his right lower extremity.

Regarding the extent of appellant's impairment to his left lower extremity, the Office hearing representative remanded for development. The case was referred to the second opinion physician, Dr. Platt who concluded that appellant had a 25 percent impairment to his left lower extremity. This is the same impairment rating that appellant's treating physician, Dr. Horowitz,

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[1] 5 U.S.C. § 8107 *et seq.*

[2] *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

[3] *Arthur E. Anderson*, *supra* note 2 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

gave appellant in his March 12, 1998 report. In his February 17, 2000 report, the district medical adviser gave appellant a nine percent impairment to his left lower extremity based on his review of Dr. Harris' November 27, 1998 report. A conflict therefore exists in the medical evidence between Dr. Horowitz's opinion that appellant had a 25 percent impairment to his left lower extremity and the district medical adviser's opinion that appellant had a 9 percent impairment to his left lower extremity. Section 8123(a) of the Federal Workers' Compensation 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.[4] The case must therefore be remanded for appellant, the case record and a statement of accepted facts to be referred to an impartial medical specialist to determine the extent of appellant's impairment to his left lower extremity using the A.M.A., *Guides* (4th ed. 1994). After such development as it deems necessary, the Office shall issue a *de novo* decision.

The part of the February 18, 2000 decision of the Office of Workers Compensation Programs issuing appellant a schedule award for a 22 percent impairment to his right lower extremity is affirmed. The part of the February 18, 2000 decision awarding appellant a schedule award for a nine percent impairment to his left lower extremity is set aside and the case remanded for further action consistent with this opinion.

Dated, Washington, DC
October 9, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[4] *Lawrence C. Parr*, 48 ECAB 445, 453 (1997).