

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DREW A. WEISMULLER and U.S. POSTAL SERVICE,  
PHOENIX MANAGEMENT SECT CENTER, Phoenix, AZ

*Docket No. 01-2231; Submitted on the Record;  
Issued August 21, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the claimant is entitled to more than a seven percent schedule award of compensation for a work-related injury to his right knee.

On January 10, 1998 appellant, then a 46-year-old letter carrier, injured both his knees while within the performance of duties. The injuries were accepted for left knee synovitis and right knee chondromalacia resulting in surgery on the right knee on May 20, 1999.<sup>1</sup>

In an April 27, 2000 CA-20 form report, appellant's treating physician, Dr. Richard Peairs, a Board-certified orthopedic surgeon, who had performed the May 20, 1999 surgery on appellant's right knee, found an eight percent impairment rating of the right lower extremity due to damage to the articular surface of the patella and patella femoral groove.

On May 19, 2000 the Office of Workers' Compensation Programs referred appellant's claim to the district medical adviser.

In a May 20, 2000 report, the district medical adviser wrote:

"This reviewer would recommend grading these pain complaints a maximal Grade III as per the Grading Scheme (Table 11) found in Chapter 3, [fourth] edition of the [American Medical Association,] *Guides [to the Evaluation of Permanent Impairment]*. This would be pain and/or altered sensation that may interfere with activity, or a 60 percent grade of a maximal 7 percent (femoral nerve), equivalent to a 4.2 percent or rounded off to 4 percent impairment for pain factors. Range of motion of 0/0 through 150/150 would be rated 0 as per Table 41, Chapter 3. There was no atrophy or weakness, for zero percent impairment. Utilizing this method and the Combined Values Chart, the four percent

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<sup>1</sup> Appellant had previously sustained a work-related injury to his right knee on June 25, 1997 that resulted in surgery in October 1997. Appellant returned to work in November 1997.

impairment for pain factors, combined with the zero percent for loss of motion, combined with the zero percent atrophy, would be equivalent to a four percent impairment of the right lower extremity, or leg. Date of maximum medical improvement was reached by April 27, 2000, following the series of Hyalgan injections.”

In a May 31, 2000 decision, the Office awarded appellant a schedule award based on a four percent impairment of the right lower extremity.

In a June 7, 2000 letter, appellant requested a hearing.

At the January 30, 2001 hearing, appellant testified that he felt he deserved greater than four percent because he had a knot in his right calf that would not go away, that he had pain on a daily basis with nightly cramps and he had hip pain as well. He added that he has not yet filed a claim for his left knee.

In a February 7, 2001 report, Dr. Peairs wrote:

“The rating to [appellant’s] right knee was based on a combination of findings at the time of surgery and Table 62 of the A.M.A., *Guides*.... Based on the A.M.A., *Guides*, a permanent impairment is awarded for narrowing of the patellofemoral articulation. Table 62 is based on x-rays, however, I had the opportunity of actually visualizing the surfaces at his surgery on May 20, 1999, and he had significant thinning of the articular surface, primarily in the patellofemoral groove, with nearly full thickness loss down the center of the patellofemoral groove. Based on that, I awarded an eight percent permanent impairment of the right lower extremity.”

In an April 20, 2000 decision, the hearing representative found a conflict in the medical evidence and remanded the case for an independent medical examination.

In a June 14, 2000 letter, appellant was referred for a referee examination to Dr. Joseph Gimbel to determine the extent of appellant’s entitlement to a schedule award rating and the date of maximum medical improvement.

In a July 19, 2001 report, Dr. Gimbel reviewed the statement of accepted facts, appellant’s medical history and performed a physical examination. He wrote:

“Based on the fact that [appellant’s] exam[ination] is benign at this time with no specific objective findings but the fact the he does have some degenerative change at present on the x-ray of his patella associated with the findings at surgery it is felt that he should be rated based on Table 17-31 of the 5<sup>th</sup> Edition of the [A.M.A.] *Guides* with a seven percent impairment of the right lower extremity.”

Specifically, he found that appellant had pain but no loss of motion, function or strength. His flexion was 150/150 and the extension was normal. The date of maximum medical improvement was October 1999.

In an August 10, 2001 decision, the Office found, appellant was entitled to three percent additional award finding the weight of the evidence rested with Dr. Gimbel as the independent medical examiner.

The Board finds appellant has not established that he is entitled to more than a seven percent schedule award.

In the present case, the Office determined that there was a conflict in the medical opinion between Dr. Peairs, appellant's attending Board-certified orthopedist, and the district medical adviser on the degree of appellant's permanent disability. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Gimbel, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>2</sup>

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>3</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Gimbel, the impartial medical specialist selected to resolve the conflict in the medical opinion. The July 19, 2000 report of Dr. Gimbel establishes that appellant had a seven percent permanent impairment of his right lower extremity.

The Board has carefully reviewed the opinion of Dr. Gimbel and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Gimbel's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Gimbel provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition which comported with this analysis.<sup>4</sup> Dr. Gimbel provided medical rationale for his opinion by explaining the fact that while appellant's examination was benign with no specific objective findings he did have some degenerative change at present on the x-ray of his patella associated with the findings at surgery and that he should be rated based on Table 17-31 of the fifth edition of the A.M.A., *Guides* with a seven percent impairment of the right lower extremity.

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<sup>2</sup> Section 8123(a) of the Act provides in pertinent part: "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." 5 U.S.C. § 8123(a).

<sup>3</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>4</sup> *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The decision of the Office of Workers' Compensation Programs dated August 10, 2001 is hereby affirmed.

Dated, Washington, DC  
August 21, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member