U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARC A. THYRRING and DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, WILLIAM J. HUGHES TECHNICAL CENTER, Atlantic City, NJ

Docket No. 02-2065; Submitted on the Record;
Issued February 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are whether appellant has greater than a 29 percent permanent loss of use of his right leg and whether he has a ratable permanent loss of use of his left leg causally related to his June 1, 1995 and May 8, 1997 employment injuries.

On June 26, 1995 appellant, then a 40-year-old wood crafter, filed a claim for a traumatic injury sustained on June 1, 1995 when he was loading plywood, lost his footing, fell to the ground, landed on his right hip and twisted his right knee.

The Office of Workers' Compensation Programs accepted that appellant sustained a lumbosacral sprain and a derangement of the right knee.

On January 30, 1996 Dr. Frederick G. Dalzell, a Board-certified orthopedic surgeon, performed surgery on appellant's right knee, described as an arthroscopic debridement and partial synovectomy.

Appellant returned to his regular work on March 30, 1996.

On May 14, 1997 appellant filed a claim for a traumatic injury to his neck, back and right knee sustained on May 8, 1997 when he fell from a wall.

The Office accepted that appellant sustained a neck and shoulder strain and a right knee sprain and contusion. The Office authorized additional surgery on his right knee and on July 21, 1997 Dr. Dalzell performed a partial medial meniscectomy. In a report dated October 16, 1997, he stated that appellant's accumulation of injuries had caused the development of degenerative joint disease of his right knee.

On August 25, 1997 appellant returned to work. On December 16, 1997 he accepted the position of construction representative, an office job requiring occasional visits to construction sites.

On October 19, 1998 appellant filed a claim for a schedule award. He submitted a report dated September 1, 1998 from Dr. David O. Weiss, an osteopath, specializing in orthopedic medicine. He noted that appellant complained of "intermittent episodes of numbness involving the right lower extremity into the great toe," daily right knee pain and stiffness, occasional episodes of right knee instability and locking and occasional episodes of left knee pain and stiffness but no instability. Dr. Weiss' examination of appellant's lumbar spine revealed paravertebral muscle spasm and tenderness from L3 to S1, decreased motion, a sitting root sign-producing radicular pain down the right lower extremity at 75 degrees, Grade 4/5 extensor halluces longus strength and "a perceived sensory deficit over the L4, L5 and S1 dermatomes involving the right lower extremity as compared to the left." Examination of the right knee revealed diffuse tenderness, marked crepitus, marked quadriceps atrophy of 5 centimeters, motion from 0 to 80 degrees and Grade 3+/5 quadriceps muscle strength. Using the fourth edition of the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment* Dr. Weiss assigned, for the right leg, 4 percent each for sensory deficits of the L4, L5 and S1 nerve roots, 15 percent for loss of motion of the knee, 13 percent for thigh atrophy, 5 percent for extensor halluces longus weakness and 17 percent for gastrocnemius weakness, for a combined total of 47 percent impairment of the right leg. For the left leg, he assigned 17 percent for quadriceps weakness and 17 percent for gastrocnemius weakness, for a combined total of 31 percent impairment of the left leg.

The Office referred appellant to Dr. Marc L. Kahn, a Board-certified orthopedic surgeon, for a second opinion on the extent of appellant's permanent impairments. In a report dated July 8, 1999, Dr. Kahn stated that appellant reported that his left knee did not bother him, though he had undergone surgery on this knee after a high school football injury. He assigned a zero percent impairment for appellant's left knee, stating there were no objective findings and no pain. Dr. Kahn then stated:

> "Regarding the right knee, this is a different story. For the medial meniscectomy, which appears to be a subtotal medial meniscectomy, using the A.M.A., *Guides*,[1] [p]age 3/85, Table 65, there is a 9 percent whole person disability and a 22 percent lower extremity disability. Regarding the aggravation of degenerative disease, using Table 62, [p]age 3/83, there is a 10 percent whole person disability and a 25 percent lower extremity disability. Regarding the atrophy, this is preexisting. Regarding his range of motion to 105 degrees, using Table 41, [p]age 3/78, there is a 4 percent whole person disability and a 10 percent lower extremity disability."

On December 28, 1999 the Office referred appellant, the case record and a statement of accepted facts to Dr. Glenn M. Zuck, an osteopath, specializing in orthopedic medicine, to resolve the conflict of medical opinion regarding appellant's impairments.

[1] Dr. Kahn used the fourth edition of the A.M.A., *Guides*.

In a report dated January 5, 2000, Dr. Zuck noted that appellant complained of chronic right knee pain, occasional buckling of the right knee and "chronic low back pain, however, is not experiencing any radicular symptoms at this time." Dr. Zuck stated that the examination revealed limited low back motion, absence of any paravertebral muscle spasm, a slight genu varus alignment of the right knee, decreased motion of the right knee secondary to advanced degenerative joint disease, intermittent sensory deficit about the left foot and ankle at the L5-S1 distribution, a mild degree of right thigh atrophy and no calf atrophy.

In a supplemental report dated February 4, 2000, Dr. Zuck stated that he agreed with Dr. Kahn, that appellant had a 22 percent right leg impairment secondary to the subtotal medial meniscectomy, a 25 percent impairment due to exacerbation of degenerative joint disease and a 10 percent impairment due to decreased range of motion.

In a report dated May 2, 2000, Dr. Zuck noted that appellant's right knee range of motion was 0 to 100 degrees. He assigned a 25 percent impairment for the degenerative arthritis of appellant's right knee.

An Office medical adviser reviewed Dr. Zuck's reports on May 17, 2000 and assigned 10 percent impairment for motion from 0 to 100 degrees, 2 percent for a partial medial meniscectomy and 20 percent for degenerative arthritis, stating that only the medial compartment seemed severe, for a combined total of 29 percent impairment of the right leg. The Office medical adviser stated that the atrophy and weakness of appellant's left leg was related to his nonwork medial meniscectomy.

On May 23, 2000 the Office issued appellant a schedule award for a 20 percent permanent loss of use of his right leg.

Appellant requested a hearing, which was held on June 2, 2000.

By decision dated January 9, 2001, an Office hearing representative found that there remained a conflict of medical opinion regarding the extent of the permanent impairment of appellant's right leg. The Office hearing representative found that Dr. Kahn's report was insufficient to create a conflict of medical opinion and that the conflict of opinion was between Dr. Weiss and Dr. Zuck.

By decision dated February 10, 2001, the Office found that appellant had no ratable impairment of his left leg.

On April 7, 2001 the Office referred appellant, the case record and a statement of accepted facts to Dr. Evan D. O'Brien, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion on the extent of the permanent impairment of appellant's right leg.

In a report dated May 7, 2001, Dr. O'Brien set forth the histories of appellant's injuries and treatment and stated that appellant complained of chronic pain in his right knee causing him to limp. Examination of appellant's right knee revealed motion of 10 to 85 degrees, a slightly antalgic gait favoring the left lower extremity, crepitus, no significant effusion, stability to varus and valgus stresses, 2 centimeters of right thigh atrophy and slight weakness in the right quadriceps as compared to the left. Dr. O'Brien stated that he personally viewed x-rays of

appellant's right knee taken on May 8, 1997, which showed "advanced tricompartmental arthritis with medial and lateral osteophytes, narrowing of the joint space, probable loose bodies and irregular joint surfaces throughout the knee. The joint space measures approximately 2 mm [millimeters] throughout the medial and lateral compartments." Dr. O'Brien then applied the fifth edition of the A.M.A., *Guides* to his findings:

> "[Appellant] has significant impairment of the right lower extremity as a result of his knee pain, arthritis and loss of motion. In calculating the percent of impairment when there are multiple types of impairment, the A.M.A., *Guides* text has a Cross-Usage Chart, Table 17-2. According to the Cross Usage Chart none of [appellant's] right lower extremity problems can be combined with another, that is muscle atrophy, muscle strength, range of motion, arthritis and gait derangement are not combinable, but considered separately. I consider the loss of motion to be the most significant impairment and by [T]able 17-10, [appellant] has 'moderate' motion impairment with his range of motion from 10 to 85 degrees and his lower extremity impairment would, therefore, be 20 percent. If the radiographically determined arthritis impairment on Table 17-31 is used, [appellant] would show a 2 mm cartilage interval with 20 percent lower extremity impairment (equal to the range of motion impairment). The other calculations including muscle strength, muscle atrophy and gait derangement all yield a lower extremity impairment rating.
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> "[Appellant] has also had a right knee arthroscopy with medial and lateral partial meniscectomy. This carries an additional right lower extremity impairment rating of 10 percent, which is combinable with the loss of motion impairment. On page 604 of the A.M.A., *Guides*, 5th edition, there is a combined values chart. When the 20 percent range of motion impairment is combined with the 10 percent medial and lateral partial meniscectomy impairment, the total right lower extremity impairment becomes 24 percent…."

By decision dated July 3, 2001, the Office found that appellant had no greater than a 29 percent permanent loss of use of his right leg.

On June 28, 2001 a hearing was held, per appellant's request, on the issue of whether he had a ratable permanent impairment of his left leg.

By decision October 9, 2001, an Office hearing representative found that appellant did not have a ratable permanent impairment of his left leg, as Dr. Weiss did not attribute appellant's left leg impairment to an employment injury and the medical evidence did not describe any pain of neurological origin relating to the left leg.

On November 14, 2001 a hearing was held, per appellant's request, on the extent of the permanent impairment of his right leg.

By decision dated January 31, 2002, an Office hearing representative found that appellant had no greater than a 29 percent permanent loss of use of his right leg.

Appellant requested reconsideration and submitted a report dated February 26, 2002 from Dr. Weiss. After noting that Dr. O'Brien concluded that appellant had a 24 percent permanent impairment of his right leg, Dr. Weiss stated:

> "At this time it should be noted that the combined values of 20 percent and 10 percent using the chart on page 604 gives 28 percent combined volume, not the 24 percent stated by Dr. O'Brien.
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> "It should also be noted that Dr. O'Brien's physical examination was limited to the lower extremities, namely the knees. [Appellant] did in fact suffer a right knee injury, however, he also suffered a second injury to his low back on May 8, 1997, which also effected his lower extremity.
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> "Even if I take a different approach in calculating [appellant's] right lower extremity impairment rating and use Dr. O'Brien's approach with 20 percent deficit for range of motion and 10 percent deficit for medial and lateral partial meniscectomy and then add the sensory deficits which were found on [appellant] from the right L4 nerve root 4 percent, from the right L5 nerve root 4 percent and from the right S1 nerve root 4 percent, my total combined right lower extremity impairment rating would be 37 percent. I can then add an additional 3 percent for pain according to [F]igure 18-1, page 574 which would give me a 40 percent total right lower extremity impairment rating."
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> "I should also be noted that [appellant] did not only have a knee injury but also suffered from a low back injury with resultant nerve root signs which can also lead to muscle atrophy and weakness. This must also be taken into consideration when calculating [appellant's] impairment rating."

An Office medical adviser reviewed Dr. Weiss's report on May 6, 2002 and indicated that lumbar radiculopathy was not documented, that no diagnostic testing was done to support this diagnosis and that Dr. Weiss did not indicate that appellant had radicular pain to his left lower extremity. The Office medical adviser also stated that the Cross Usage Chart of the A.M.A., *Guides* did not allow combining impairment from range of motion with neurologic findings.

By decision dated May 16, 2002, the Office found that Dr. Weiss's February 26, 2002 report was of limited probative value and did not establish that appellant was entitled to a greater schedule award than he had received.

The Board finds that the medical evidence does not establish that appellant has a ratable permanent impairment of the left leg.

Although Dr. Weiss, in a September 1, 1998 report, concluded that appellant had a 31 percent permanent impairment of the left leg due to muscle weakness, his report did not explain how this weakness was related to either of appellant's employment injuries. In his February 26, 2002 report, Dr. Weiss stated that appellant "suffered from a low back injury with resultant nerve

root signs, which can also lead to muscle atrophy and weakness." However, his only examination of appellant on September 1, 1998 showed radicular pain down only the right leg on the sitting root sign and "a perceived sensory deficit over the L4, L5 and S1 dermatomes involving the right lower extremity as compared to the left." Dr. Weiss has not shown that appellant has any impairment of the left leg emanating from the back or from appellant's employment injuries.

The Board finds that the case is not in posture for a decision on the extent of permanent loss of use of appellant's right leg.

The schedule award provisions of the Federal Employees' Compensation Act[2] and its implementing regulation[3] 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 regulation as the appropriate standard for evaluating schedule losses.

The Office properly evaluated the permanent loss of use of appellant's right leg related to his knee problem. Dr. O'Brien, an impartial medical specialist resolving a conflict of medical opinion,[4] properly used the tables of the fifth edition of the A.M.A., *Guides* to conclude that appellant had a 20 percent impairment for a moderate loss of motion or a 20 percent impairment for arthritis as measured by his decreased cartilage interval. He stated that he considered the loss of motion to be appellant's most significant impairment, but the Cross Usage Chart, Table 17-2, indicates that either of these impairments -- range of motion and arthritis -- cannot be combined with impairments for atrophy or muscle strength or with each other. Dr. O'Brien properly concluded that the impairment for loss of motion could be combined with that for the partial meniscectomy, but incorrectly combined the 20 percent for loss of motion with 10 percent for the partial meniscectomies. Correct combining of these impairments results in a 28 percent impairment, not the 24 percent stated by Dr. O'Brien. The case record, however, indicates that appellant underwent only a medial, not a lateral, meniscectomy. For only one partial meniscectomy, Table 17-33 assigns a 2 percent impairment of the leg. In any event, the permanent impairment of appellant's right leg related to his knee problem is no greater than 29 percent.

Dr. O'Brien did not address whether appellant had any permanent impairment of his right leg emanating from his back. Dr. Weiss concluded that appellant had L4, L5 and S1 nerve root sensory deficits affecting his right leg and described findings on examination that lent support to

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] In situations where there are 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 on a proper factual background, must be given special weight. *James P. Roberts*, 31 ECAB 1010 (1980).

this thesis. Dr. Zuck stated that appellant had chronic low back pain but did not have radicular symptoms. There thus remains a conflict of medical opinion on whether appellant has a permanent impairment of his right leg causally related to his May 8, 1997 injury to his back. The case will be remanded to the Office so it can obtain a supplemental report from Dr. O'Brien addressing this issue.

The October 9, 2001 decision of the Office of Workers' Compensation Programs is affirmed, as is the Office's May 16, 2002 decision to the extent that it found no left leg impairment. The Office's May 16, 2002 decision is otherwise set aside, as is the Office's January 31, 2002 decision and the case is remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
February 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member