United States Department of Labor
Employees' Compensation Appeals Board

ROSE V. FORD, Appellant	)	
and	)	**Docket No. 04-15**
	)	**Issued: April 6, 2004**
U.S. POSTAL SERVICE, POST OFFICE, Duluth, GA, Employer	)	

Appearances:
Rose V. Ford, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 29, 2003 appellant filed a timely appeal from a decision of an Office of Workers' Compensation Programs' hearing representative dated April 8, 2003, which affirmed a July 10, 2002 decision, in which the Office found that appellant was not entitled to a schedule award for greater than a 33 percent impairment of the right lower extremity. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has greater than a 33 percent impairment of the right lower extremity for which she received a schedule award. On appeal appellant submitted a letter from

her treating physician, which addressed the Office hearing representative's decision and challenged the impairment rating of the Office medical adviser.[1]

FACTUAL HISTORY

On February 6, 1986 appellant, then a 30-year-old personnel clerk, fell on her right knee in the employing establishment's parking lot while in the performance of duty. The Office accepted the claim for fracture of the lower pole of the right patella with disruption of the extensor mechanism, osteoarthritis of the right knee and arthroscopies of the right knee performed on February 6, 1986 and June 12, 2000. The Office issued a schedule award on March 8, 1989 for a seven percent impairment of the right lower extremity. The period of the award was November 1, 1988 to March 22, 1989. Appellant appealed this percentage and on May 18, 2000 was awarded an additional 26 percent impairment for a total schedule award of 33 percent for the right lower extremity. The period of the award was February 9, 1990 to July 18, 1991.

On February 8, 2002 appellant filed a CA-7 claim for an increased schedule award and submitted a January 9, 2002 report from Dr. Ralph D'Auria, a Board-certified orthopedic surgeon, who had last examined appellant on June 26, 2001. He recorded physical findings and stated that appellant had whole body impairment ratings as follows: 6 percent for post-traumatic arthritis; 20 percent for mild gait derangement necessitating routine use of a cane; 4 percent for decreased range of motion (flexion); and 2 percent for atrophy of the right thigh. He concluded that appellant had a 32 percent impairment of the whole person based on the combined tables. In an addendum report, he stated that appellant had 50 percent impairment of the right lower extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[2]

On February 27, 2002 an Office medical adviser reviewed Dr. D'Auria's report and noted that there were no x-rays to document that appellant had arthritis in the right knee. He opined that no permanent impairment rating could be assessed for gait derangement since appellant did not use a cane routinely. Dr. D'Auria opined that there was no impairment due to atrophy, but 10 percent impairment due to decreased range of motion of the right knee.

In a February 28, 2002 letter, the Office asked Dr. D'Auria to review the Office medical adviser's report. On March 6, 2002 he replied to the Office's letter, noting that in reaching his impairment rating preference had been given to the gait derangement criteria *versus* the other rating criteria. He categorized appellant's use of the cane as "routine though inconstant." Citing

[1] The Board does not have jurisdiction to review the additional medical statement submitted by appellant on appeal, nor the evidence submitted by appellant subsequent to the Office hearing representative's April 8, 2003 decision. The Board's jurisdiction is limited to evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c); *Sherry L. McFall*, 51 ECAB 436 (2000). This does not preclude appellant from submitting this evidence to the Office along with a written request for reconsideration; *see* 20 C.F.R § 10.606(b).

[2] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB ___ (Docket No. 01-1361, issued February 4, 2002).

Table 17-5 of the A.M.A., *Guides*, Dr. D'Auria opined that appellant had 20 percent impairment of the whole person and 50 percent impairment of the right lower extremity based on her routine use of a cane. He noted that the presence of arthritis had been confirmed during appellant's surgery and that the proper atrophy measurements for her right thigh was actually one and one-half centimeters, translating to a five and one-half percent impairment of the lower leg at Table 17-6. Dr. D'Auria agreed with the Office medical adviser's determination of 10 percent lower extremity impairment for loss of range of motion, but felt that appellant was entitled to have her rating assessed under the criteria for gait derangement as opposed to findings based on range of motion, arthritis or atrophy.

In a report dated April 1, 2002, the Office medical adviser commented on Dr. D'Auria's March 6, 2002 statement. He again noted that an x-ray evaluation of the joint had not been provided as required by section 17.2H of the A.M.A., *Guides*. The Office medical adviser noted that appellant did not have full-time gait derangement and that an impairment rating based on Table 17-5 (lower limb impairment due to gait derangement) was not appropriate. He agreed that the atrophy did equal six percent impairment of the right lower extremity, but noted that Table 17-2 precluded using an atrophy impairment with an impairment due to decreased range of motion from weakness. The Office medical adviser, therefore, opined that appellant had only a 10 percent impairment of the right lower extremity based on the physical findings with respect to decreased range of motion.

In order to resolve the conflict in medical opinion between the Office medical adviser and Dr. D'Auria, on May 2, 2002 the Office referred appellant along with a copy of the medical record and a statement of accepted facts to Dr. J.W. Spivey, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation. He recorded physical findings and noted the results of right knee x-rays in full extension and lateral views, which showed a one millimeter cartilage interval. Dr. Spivey reported that there was 1½ centimeter atrophy of the right thigh and that flexion of the right knee was limited to 90 degrees. He assigned the following whole person impairment ratings: 20 percent for gait derangement; 2 percent for thigh atrophy; 10 percent for decreased muscle strength; 4 percent for decreased range of motion of the right knee; and 6 percent for arthritis. Using the combined tables on page 604 of the A.M.A., *Guides* (5th edition), he concluded that appellant had 38 percent whole body impairment.

The Office next sent Dr. Spivey's report to an Office medical adviser for review and calculation of a schedule award. In a June 6, 2002 report, the Office medical adviser opined that Dr. Spivey had not properly applied the A.M.A., *Guides*, noting that a rating based on gait derangement could not be combined with any other impairment. The Office medical adviser specifically noted that Table 17-2 precluded combining ratings for loss of motion, atrophy and osteoarthritis. He further noted that, under the A.M.A., *Guides*, gait derangement should not be used if other methods were available. The Office medical adviser found that appellant had a 15 percent impairment for arthritis under Table 17-31 and a 7 percent impairment due to a fractured patella under Table 17-33. Under the combined tables, he calculated that appellant had a 21 percent permanent impairment of the right leg.

In a June 10, 2002 letter, the Office requested that Dr. Spivey clarify his opinion in consideration of the Office medical adviser's report. On June 18, 2002 Dr. Spivey agreed that the A.M.A., *Guides* strongly recommended against using the gait derangement method he had

applied to render his impairment rating. He, therefore, withdrew that method from his evaluation and recalculated appellant's impairment as 7 percent impairment for a healed patella fracture under Table 17-33 and 15 percent impairment for arthritis under Table 17-31. Dr. Spivey concluded that appellant had a total of 21 percent impairment of right lower extremity in agreement with the Office medical adviser's findings.

On July 10, 2002 the Office denied appellant's claim for an increased schedule award, finding that she failed to establish that she had greater than 33 percent impairment of the right lower extremity. She subsequently requested a hearing, which was held on February 4, 2002. Prior to the hearing, appellant submitted a July 18, 2002 report from Dr. D'Auria, who referenced page 527 of the A.M.A., *Guides,* which states that, "if more than one method can be used, the method that provides the higher rating should be adopted." He noted that he had assigned a 50 percent impairment rating to appellant's right leg in accordance with Table 17-5 and a 20 percent whole person impairment due to gait derangement under Table 17-5. Given the guidelines on page 527 of the A.M.A. *Guides*, Dr. D'Auria argued that a rating based on gait derangement at Table 17-5 should be adopted since that method provided the highest rating. In a decision dated April 8 2003, an Office hearing representative rejected Dr. D'Auria's interpretation of the A.M.A., *Guides* and affirmed the Office's July 10, 2002 decision.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[3] The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations has adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[7] Effective February 1, 2001, schedule awards are determined in accordance with the fifth edition of the A.M.A., *Guides*.[8]

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date causally related to an employment injury. Office procedures state that claims for increased schedule awards may be based on an incorrect calculation of the original award or new exposure.[9] To the extent that a claimant is asserting that

[3] For example, the Act provides that, for a total or 100 percent loss of use of a leg, an employee shall receive 312 weeks of compensation. 5 U.S.C. § 8107(c)(1).

[7] 20 C.F.R. § 10.404 (2002).

[8] FECA Bulletin No. 01-05 (issued January 29, 2001).

[9] *Linda T. Brown*, 51 ECAB 115 (1999).

the original award was erroneous based on his or her medical condition at that time, this would be a request for reconsideration. A claim for an increased schedule award may be based on new exposure or on medical evidence indicating the progression of an employment-related condition, without new exposure to employment factors, has resulted in a greater impairment than previously calculated.[10]

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 person who shall make an examination.[11] 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.[12]

ANALYSIS

In this case, appellant sought an increased schedule award and provided a report from Dr. D'Auria, finding that he had a 50 percent impairment of the right leg based on severe gait derangement as defined at Table 17-5(h), page 529 of the fifth edition of the A.M.A., *Guides*. However, a conflict was created in the record when an Office medical adviser applied Dr. D'Auria's physical findings to the A.M.A. *Guides* and determined that appellant was entitled to only a 10 percent impairment based on loss of range of motion. The Office medical adviser disagreed that appellant was entitled to rely on the criteria of the gait derangement for calculation of his schedule award. In order to resolve this conflict the Office properly sent appellant for an impartial medical evaluation with Dr. Spivey, who calculated appellant's percentage of permanent impairment of the right lower extremity as 10 percent.

The Board finds that Dr. Spivey's opinion is entitled to special weight as he is an impartial medical specialist and his impairment rating is in agreement with the rating provided by the Office medical adviser. Although Dr. D'Auria maintains that appellant is entitled to have her rating determined under the criteria of gait derangement and not solely based on range of motion findings, the Board rejects this interpretation of the A.M.A., *Guides*.

The Board notes that section 17.2c of the A.M.A., *Guides* provides as follows:

> "Gait derangement is present with many different types of lower extremity impairments and is always secondary to another condition. An impairment rating due to a gait derangement should be supported by pathologic findings, such as x-rays. Except as otherwise noted, the percentages given in Table 17-5 are for full time gait derangements of persons who are dependent on assistive devices.

[10] *Id*.

[11] *See* 5 U.S.C. § 8123(a); *Roger W. Griffith*, 51 ECAB 491 (2000).

[12] *Solomon Polen*, 51 ECAB 341 (2000).

> *Whenever possible, the evaluator should use a more specific method***.** When the gait method is used, a written rationale should be included in the report. The lower limb impairment percents shown in Table 17-5 stand alone and are not combined with any other impairment evaluation method."[13]

Contrary to Dr D'Auria's opinion, section 17.2c of the fifth edition of the A.M.A., *Guides* precludes the use of gait derangement to calculate appellant's impairment if a more specific method is available to assess the impairment. The Board finds that Dr. Spivey properly determined that appellant had 7 percent impairment for a healed patella fracture under Table 17-33 and 15 percent impairment for arthritis under Table 17-31. The Board, therefore, affirms the findings of Dr. Spivey and the Office medical adviser that appellant had a total of 21 percent impairment of the right lower extremity. Since appellant has already received a schedule award for a 33 percent impairment, more than her current rating of impairment, the Board concludes that she has not shown her entitlement to an increased schedule award.

CONCLUSION

The Board finds that appellant is not entitled to greater than a 33 percent impairment of the right lower extremity for which she received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 8, 2003 is affirmed.

Issued: April 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[13] A.M.A., *Guides*, *supra* note 2 at 529.