United States Department of Labor
Employees Compensation Appeals Board

STEVEN G. LEWIS, Appellant	)	
and	)	**Docket No. 04-1049**
	)	**Issued: August 4, 2004**
U. S. POSTAL SERVICE POST OFFICE, Portland, ME, Employer	)	

Appearances:
Steven G. Lewis, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 24, 2004, finding appellant entitled to a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award decision in this case.

ISSUE

The issue is whether appellant is entitled a schedule award for greater than two percent permanent impairment to his right lower extremity.

FACTUAL HISTORY

On November 1, 1999 appellant, then a-50-year old body fender repairman, filed a notice of traumatic injury alleging that his right knee snapped when he stepped out of a postal vehicle. In support of his claim appellant submitted a December 7, 1999 report from Dr. John Padavano, a Board-certified osteopathic orthopedic surgeon, who stated that appellant presented in no acute distress, although his right knee showed moderate effusion and tenderness about the

posterolateral aspect of the right knee joint. He noted that x-rays revealed degenerative joint disease in the right knee. In a January 3, 2000 report, Dr. Padavano stated that a magnetic resonance imaging scan revealed a torn medial meniscus and a possible partial anterior cruciate ligament (ACL) tear at the femoral insertion, though it did not appear to be compromised.

In a January 3, 2000 decision, the Office accepted the claim for internal derangement of the right knee and subsequently authorized surgery. On January 12, 2000 appellant underwent an arthroscopic partial medial and lateral meniscectomy of the right knee with a femoral chondroplasty. Appellant returned to full-time regular duty on February 15, 2000.

On September 11, 2002 appellant requested a schedule award. In a November 4, 2002 report, Dr. Padavano stated that appellant has 5 to 120 degrees motion in his right knee with no effusion. He noted that x-rays revealed mild medial joint line space narrowing as well as slight arthrosis to the patellofemoral joint. Dr. Padavano opined that based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) appellant had an 11 percent impairment of the whole person.

The Office referred appellant's medical record to Dr. Paul Hellman, the district medical adviser, who stated in a February 12, 2004 report, that the date of maximum medical improvement was February 15, 2000 and that he relied on the A.M.A. *Guides* (5th ed. 2001) to evaluate appellant's impairment. He explained that pursuant to the A.M.A., *Guides* text regarding diagnosis based estimates at section 17.2j, page 545-549 and Table 17-33, page 546, 547 concerning diagnosis based estimates, there were at least two relevant considerations referable to a possible schedule award. Dr. Hellman stated that the arthroscopy report made clear that both appellant's medial and lateral right knee menisci were manipulated surgically, but it was not clear "whether a medial meniscectomy, partial ALONE, (emphasis in the original) was performed," or whether a procedure was also performed for the frayed lateral meniscus (shaving it) which was not reported to have any tear and whether such procedure was of the level to be considered by the A.M.A., *Guides*. Dr. Hellman concluded from the record that a partial medial meniscectomy was performed, but that a lateral meniscus meniscectomy was not performed.

Dr. Hellman further noted that in his November 4, 2002 report, Dr. Padavano was inconclusive whether or not appellant had laxity in his ACL. He noted that Dr. Padavano mentioned laxity in his summary, but failed to mention it in the results of various maneuvers he performed during his examination of appellant's knee; although laxity would be expected with the diagnosis of an internal derangement of the right knee. Dr. Hellman opined that the Office needed to seek clarification from Dr. Padavano regarding the basis for a finding of laxity.

Dr. Hellman added that it is very unlikely that the arthritis seen in appellant's knee was a result of the accepted injury, yet Dr. Padavano comingled his description of the right knee conditions by including soft tissue injury (*i.e.*, menisci and ACL) with bone or the arthritic conditions (*i.e.*, x-rays showing mild medial joint line space narrowing as well as slight arthrosis to the patellofemoral joint) Dr. Hellman stated that the onset of appellant's arthritis of the knee and patellofemoral joint apparently predated the injury, but that the current medical evidence did not distinguish between the spontaneous progress of this disease and any possible aggravation acceleration due to the accepted injury. In summary, Dr. Hellmann found a two percent

permanent impairment of the right lower extremity based on partial medial meniscectomy and deferred judgment on the issue of laxity until further input from Dr. Padavano was obtained.

In a February 24, 2004 decision, the Office found appellant entitled to a two percent permanent impairment of the right lower extremity based on partial medial meniscectomy.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,[2] including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.[3]

The schedule award provision of the Act[4] and its implementing regulation[5] 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.[6]

It is well established that in determining the amount of the schedule award for a member of the body that sustained an employment-related impairment, preexisting impairments are to be included in the evaluation of permanent impairment.[7]

Proceedings under the Act are not adversarial in nature; nor are the Office a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[8]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *See id.*; *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

[7] *See Lela M. Shaw*, 51 ECAB 372 (2000).

[8] *Elaine K. Kreymborg*, 41 ECAB 256 (1989).

ANALYSIS

The Board finds that the present case is not in posture for decision. The Office referred Dr. Padavano's reports to Dr. Hellman, the district medical adviser to review and apply the A.M.A., *Guides* to determine appellant's partial permanent impairment. However, Dr. Hellman concluded that he could not fully respond to that request due to conflicting and ambiguous evidence and conclusions contained in Dr. Padavano's reports.

In obtaining medical evidence required for a schedule award, a description of the claimant's impairment must be obtained from the attending physician. The evaluation made by the attending physician must include, where applicable, the loss is degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[9]

While Dr. Hellman explained that appellant clearly underwent a partial medical meniscectomy of the right knee which caused a two percent permanent impairment, specifically, Dr. Hellman stated that he was deferring judgment on his determination of the other aspects appellant's impairment until the Office received clarification from Dr. Padavano regarding the diagnoses of mild ACL laxity and arthritis. In recommending clarification of Dr. Padavano's report he stated that Dr. Padavano failed to clearly state the basis of his finding that appellant had ACL laxity however that if medically supported appellant could be entitled to an additional seven percent award for this impairment. Also he indicated that appellant apparently had arthritis of the right knee which could be compensable as a preexisting impairment or as aggravated by the accepted injury. As the Office has yet to obtain the clarifications requested by Dr. Hellman, the Board will not make a final determination of appellant's condition. The Board notes that as the Office referred appellant to Dr. Hellman, it has the responsibility to obtain an evaluation that resolves the unresolved issue and it cannot simply ignore the fact that an issue remains unresolved.[10]

CONCLUSION

The case is to be remanded to the Office to obtain a clarifying report from Dr. Padavano and whatever further development the Office deems necessary before issuing a *de novo* decision.

[9] *Noe L. Flores*, 49 ECAB 344 (1998).

[10] *Mae Z. Hackett* 34 ECAB 1421 (1983).

ORDER

IT IS HEREBY ORDERED THAT the decision by the Office of Workers' Compensation Programs dated February 24, 2004 is set aside and the case remanded to the Office for further development consistent with this decision.

Issued: August 4, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member