

**United States Department of Labor
Employees' Compensation Appeals Board**

JUANITA L. SPENCER, Appellant

and

**DEPARTMENT OF COMMERCE, CENSUS
BUREAU, St. Louis, MO, Employer**

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**Docket No. 05-527
Issued: June 21, 2005**

Appearances:
Juanita L. Spencer, 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
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On December 27, 2004 appellant timely filed an appeal from a September 17, 2004 decision by the Office of Workers' Compensation Programs which found that she did not have more than a 10 percent permanent impairment of the right leg for which she received a schedule award. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether appellant has more than a 10 percent permanent impairment of the right lower extremity.

FACTUAL HISTORY

On December 8, 1998 appellant, then a 50-year-old field representative, was tired from lack of sleep and lost control of her car, going down an embankment. She then walked for a half hour to a house with a telephone. In an April 12, 1999 decision, the Office denied appellant's

claim because she had not established that her injury was sustained while in the performance of duty.

In a May 5, 1999 letter, appellant requested that an Office hearing representative conduct a review of the written record. Appellant had surgery on her right knee on September 29, 1998. She submitted several medical notes from Dr. Michael Crist, an osteopath, who noted that appellant was approximately three months post knee surgery and was in a motor vehicle accident a few weeks previously. He indicated that appellant had considerable pain in her right knee and might need a total knee replacement.

In an August 2, 1999 decision, the Office hearing representative found that the Office had not determined whether appellant was in the performance of duty at the time of her automobile accident. He set aside the Office's April 12, 1999 decision and remanded the case to the Office to address the issue of performance of duty and for development of whether she sustained an aggravation of her preexisting right knee condition.

In a September 20, 1999 report, Dr. Peter K. Buchert stated that he had treated appellant for her right knee condition since June 25, 1996. He performed surgery on September 29, 1998. Dr. Buchert indicated that appellant had sustained a medial meniscus tear, large flaps off the medial femoral condyle and fraying of the patellofemoral groove. He noted that a December 22, 1998 examination of appellant revealed her right knee condition was worse. Dr. Buchert stated that x-rays showed significant osteoarthritis in the right knee. He indicated that appellant began to have more trouble with instability and her arthritis progressed. Dr. Buchert noted that her condition was worse by about five percent. He concluded that appellant had a permanent aggravation of her preexisting knee condition due to her automobile accident and would need a total knee replacement in the next one to two years.

In an October 1, 1999 letter, the Office accepted appellant's claim for aggravation of her right knee degenerative arthritis.

The Office requested further information from Dr. Buchert on appellant's condition. In an October 25, 1999 report, he stated that appellant had trouble with her right knee but was improving prior to the automobile accident. Dr. Buchert indicated that, after the accident, appellant related increased pain in the right knee which was worse than her left knee. He observed that, prior to the accident, both knees were equal in pain. Dr. Buchert concluded that appellant's right knee condition had not improved and, 10 months later, she sustained a permanent aggravation of her preexisting condition.

In a September 26, 2000 note, Dr. Buchert indicated that on examination appellant had a full range of motion, good stability and was neurovascularly intact. He stated that he did not have anything more to offer appellant and commented that she could work.

In an October 1, 2002 report, Dr. Barbara J. Tellerman stated that a magnetic resonance imaging (MRI) scan of the right knee showed a severe tear of the medial meniscus and a linear tear of the lateral meniscus. In an April 30, 2003 report, Dr. Timothy C. Galbraith, an osteopath, stated that appellant had medial and lateral joint line tenderness, pain on flexion, inability to squat, and a general inability to be active because of her knee injuries. He noted that appellant

had some arthritis in the right knee. Dr. Galbraith stated that appellant refused surgery and estimated that she had a 37 percent permanent impairment of the right knee according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

The Office referred appellant to Dr. Robert Conway for an impairment evaluation. In a November 13, 2003 report, he reviewed appellant's medical history including the September 29, 1998 knee surgery. He reported that appellant had considerable pain in the right knee. Dr. Conway indicated that appellant had 100 degrees of flexion in the right knee, compared to 105 degrees on the left knee. Appellant had no effusion of the knees and had bony hypertrophy of both knees, with normal sensation. He diagnosed aggravation of osteoarthritis in the right knee as well as new medial and lateral meniscal tears. Dr. Conway stated that appellant had no impairment due to gait abnormality, or atrophy and found a 10 percent impairment of the right knee due to loss of flexion with no impairment for loss of extension. He stated, however, that not all of appellant's impairment was due to the work injury. Dr. Conway estimated that appellant had a five percent permanent impairment due to the employment injury.

In a November 19, 2003 memorandum, an Office medical adviser noted that the Office did not apportion between employment-related and nonemployment-related impairment. He commented that, even if a majority of a claimant's condition was not work related, appellant was entitled to the entire impairment rating associated with Dr. Conway's evaluation. The Office medical adviser found a 10 percent permanent impairment for the range of motion restriction to appellant's right knee.

In a December 12, 2003 decision, the Office issued appellant a schedule award for a 10 percent permanent impairment of the right leg.

In a January 5, 2004 letter, appellant requested a review of the written record by an Office hearing representative. She contended that she should have received a schedule award for a 37 percent impairment based on Dr. Galbraith's medical report.

On February 26, 2004 appellant underwent additional right knee surgery, which included arthroscopic partial medial and lateral meniscectomy and chondroplasty of the femoral joint.

In a May 11, 2004 decision, the Office hearing representative noted that appellant had undergone further right knee surgery. He concluded that appellant would not reach maximum medical improvement until she recovered from the surgery. The Office hearing representative commented that the Office had not determined whether the knee condition was temporary or permanent and had not accepted that the meniscal tears were related to the employment injury. He set aside the December 12, 2003 schedule award and remanded the case for additional development of the medical evidence.

The Office referred appellant to Dr. Conway for a supplemental evaluation. In an August 30, 2004 report, Dr. Conway diagnosed persistent right knee pain, status post right partial medial and lateral meniscectomy and femoral chondroplasty. He commented that her pain appeared to be due to an aggravation of the osteoarthritis of the medial and lateral compartments and patellofemoral joint. Dr. Conway stated that the aggravation was permanent, based on persistent pain and limitation of motion. He indicated that appellant's meniscal tears of the right

knee were caused by the December 8, 1998 employment injury because the tears were not present until after the motor vehicle accident. Dr. Conway stated that appellant had a 3 percent impairment due to right thigh atrophy and a 10 percent impairment of the right leg due to loss of flexion. He indicated that, under the diagnosis-based impairment, appellant had a 10 percent permanent impairment of the right leg due to surgery for the meniscal tears. Dr. Conway noted that these impairment ratings could not be combined but indicated that appellant had a 10 percent permanent impairment of the right leg.

In a September 17, 2004 decision, the Office denied appellant's claim for an increased schedule award, finding that she had no more than a 10 percent impairment of the right lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act¹ and its implementing regulation² sets 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.³

ANALYSIS

Dr. Conway indicated that appellant had mild atrophy of the right thigh. Under the A.M.A., *Guides*, a mild atrophy of the thigh represents a three to eight percent impairment of the leg.⁴ He stated that appellant had a 10 percent permanent impairment of the right leg due to 100 degrees of flexion in the knee.⁵ Pursuant to Table 17-10 knee flexion of less than 110 degrees is a 10 percent permanent impairment of the lower extremity. Also, pursuant to Table 17-33, at page 546, a partial medial or lateral meniscectomy is a 10 percent permanent impairment of the lower extremity. Dr. Conway concluded that appellant had a 10 percent permanent impairment of the right leg. Under the Guide to the Appropriate Combination of Evaluation Methods, Table 17-2, at page 526 of the A.M.A., *Guides*, impairment ratings for muscle atrophy, loss of range of motion and diagnosis-based estimates cannot be combined with each other. Appellant is therefore entitled to only the greater of these three evaluation methods. Appellant is entitled to a 10 percent impairment for either the loss of flexion or the meniscectomy, and only 3 percent for

¹ 5 U.S.C. § 8107.

² 20 C.F.R. § 10.404 (1999).

³ Fifth edition 2001.

⁴ Table 17-6 at p. 530.

⁵ Table 17-10 at p. 537.

the muscle atrophy. The Office properly granted a schedule award for a 10 percent permanent impairment of the lower right extremity as these impairment values may not be combined.⁶

CONCLUSION

The Board finds that appellant has no more than a 10 percent permanent 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 September 17, 2004 is affirmed.

Issued: June 21, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁶ For this reason, the report of Dr. Galbraith is of diminished probative value as the physician combined impairment ratings contrary to Table 17-2.