United States Department of Labor
Employees' Compensation Appeals Board

CLEVELAND STEVENSON, Appellant	)	
and	)	**Docket No. 05-1995**
	)	**Issued: January 18, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Princeton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 27, 2005 appellant filed a timely appeal of a May 11, 2005 decision of the Office of Worker's Compensation Programs affirming a prior schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has established that he sustained greater than a 15 percent impairment of the left lower extremity, for which he received a schedule award. On appeal, he contends that the Office erred by according the weight of the medical evidence to the report of Dr. Robert R. Bachman, a Board-certified orthopedic surgeon and impartial medical specialist. Appellant asserts that Dr. Bachman did not examine his left knee properly as he did not remove the elastic support appellant wore. He contends that Dr. Bachman did not include observed crepitus in his schedule award rating, perform strength testing of the quadriceps or gastrocnemius muscles, "provide any rating for the degenerative changes, nor request x-rays to confirm whether or not there" was an applicable impairment rating for arthritis.

FACTUAL HISTORY

The Office accepted that on January 11, 2002 appellant, then a 45-year-old letter carrier, sustained a torn left medial meniscus when he slipped and fell while getting into his delivery vehicle. He was treated by Dr. Stanley Markunas, an attending osteopath, who submitted reports dated January 11 to April 16, 2002 diagnosing a possible meniscal tear.[1] Dr. Markunas ordered a magnetic resonance imaging (MRI) scan of the left knee, performed on February 1, 2002, showing considerable joint effusion, a moderate-sized Baker's cyst, tear of the posterior horn of the medial meniscus and a "[s]ubchondral bruise or osteochondritis desiccants … in the medial condyle of the distal femur."

Dr. Markunas referred appellant to Dr. Ronald M. Krasnick, an attending Board-certified orthopedic surgeon. In a February 14, 2002 report, Dr. Krasnick diagnosed a posterior horn tear of the left medial meniscus, with an osteochondral defect in the medial femoral condyle possibly associated with a loose body. On April 12, 2002 he performed a partial medial meniscectomy of the left knee with joint debridement and removal of loose bodies, authorized by the Office. He released appellant to full duty as of May 28, 2002. Dr. Krasnick released appellant to full duty as of June 10, 2002. Appellant received compensation on the daily and periodic rolls from May 19 to June 10, 2002 at the two-thirds rate. He returned to full duty on June 11, 2002.

On May 20, 2003 appellant claimed a schedule award and submitted a March 6, 2003 report from Dr. David Weiss, an osteopath. He provided a history of injury and reviewed the medical record. Dr. Weiss related appellant's complaints of left knee pain and noted that he walked with a "noticeable left lower extremity limp." On examination he observed a full range of motion, crepitus with femoral compression, crepitus within the medial and lateral joint compartments and tenderness over the medial joint line and space. Dr. Weiss observed no quadriceps atrophy but that quadriceps strength was at 4/5 and gastrocnemius strength at 4+/5. He diagnosed post-traumatic internal derangement of the left knee with medial meniscal tar and loose bodies, degenerative joint disease of the left knee and status post arthroscopy. Referring to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, Dr. Weiss found a 12 percent impairment of the left lower extremity for 4/5 motor strength deficit of the left quadriceps according to Table 17-8, page 532.[2] He also found a 17 percent impairment of the left lower extremity according to Table 17-8 for the 4/5 motor strength deficit in the left gastrocnemius, affecting ankle plantar flexion.[3] Dr. Weiss then combined the two impairments to equal 27 percent. He allowed a three percent rating due to pain, according to

[1] Appellant also submitted chart notes from Dr. Markunas dated July 2000 to September 2001 regarding treatment for infections and a lumbar strain. These notes are not related to the present claim).

[2] Table 17-8, page 532 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment Due to Lower Extremity Muscle Weakness." According to Table 17-8, a Grade 4 impairment of either knee flexion or extension equals a 12 percent impairment of the lower extremity.

[3] According to Table 17-8, a Grade 4 impairment of ankle plantar flexion equals a 17 percent impairment of the lower extremity.

igure 18-1, page 574.[4] Dr. Weiss, therefore, opined that appellant had a 30 percent impairment of the left lower extremity.

On June 10, 2003 the Office referred the medical evidence to an Office medical adviser for review. In a June 10, 2003 report, he noted March 6, 2003 as the date of maximum medical improvement. On review of Dr. Weiss' report, the Office medical adviser opined that the gastrocnemius plantar flexion weakness described was not related to the meniscal tear or arthroscopic surgery but to an "ankle or heel cord problem." The medical adviser also commented that there was no atrophy of the calf muscle observed. He opined that appellant had a 12 percent impairment of the left lower extremity due to 4/5 quadriceps strength, according to Table 17-8, page 532. The Office medical adviser also found a three percent impairment due to pain, according to Figure 18-1, page 574 of the A.M.A., *Guides*. He then added the 2 impairments to equal a 15 percent impairment of the left lower extremity.

By decision dated July 9, 2003, the Office awarded appellant a schedule award for a 15 percent impairment to the left lower extremity, equivalent to 43.20 weeks of compensation payable at the two-thirds rate applicable to claimants with no eligible dependents.[5]

Appellant requested an oral hearing. He asserted that he was entitled to receive compensation at the augmented or three-fourths rate as he had a dependent minor child. Appellant submitted his child's birth certificate and related documentation.

By decision dated December 29, 2003, an Office hearing representative found that the case was not in posture for a hearing, setting aside the July 9, 2003 schedule award finding a conflict of medical opinion. The hearing representative explained Dr. Weiss, for appellant and the Office medical adviser, for the government, provided differing percentages of impairment to appellant's left lower extremity. The hearing representative, therefore, remanded the case for appointment of an impartial medical examiner to resolve this conflict. The hearing representative found that appellant established his entitlement to compensation at the augmented rate and directed the Office to adjust his compensation appropriately.

On remand the Office referred appellant, the case record and a statement of accepted facts, to Dr. Robert R. Bachman, a Board-certified orthopedic surgeon. In a February 4, 2004 report, he provided a history of injury and treatment and reviewed appellant's complaints of pain and swelling in the left knee at the end of the workday. Dr. Bachman noted that "[p]rior to the examination, [appellant] did permit removal of the elastic knee support on the left." On examination Dr. Bachman found a full range of motion, "medial femoral osteophytes more left than right," no effusion or synovitis, no atrophy in the thigh or calf muscles and no ligamentous laxity. He found no "evidence of any neurological deficit or weakness in the" left gastrocnemius muscle or elsewhere in the left leg on examination. Dr. Bachman reviewed the February 1, 2002

[4] Figure 18-1, page 574, is entitled "Algorithm for Rating Pain-Related Impairment in Condition Associated with Conventionally Ratable Impairment. According to Figure 18-1, pain related impairment increasing "the burden of the individual's condition *slightly*" can add up to a three percent impairment to the functional assessment impairment rating. (Emphasis in the original.)

[5] The record contains a schedule award decision dated July 8, 2003 that differs from the July 9, 2003 decision only in the end date of the schedule award period.

MRI scan and opined that preexisting degenerative changes in the medial femoral condyle caused the demonstrated loose bodies, which were discharged at the time of the January 11, 2002 injury. Dr. Bachman stated that based on Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides*,[6] appellant had a two percent impairment of the left lower extremity. He also opined that the loose bodies removed in the January 11, 2002 surgery represented an additional three percent impairment of the left lower extremity, noting that there was "no table or point of reference for the loose bodies." Dr. Bachman then used the Combined Values Chart at page 64 of the A.M.A., *Guides* to arrive at a five percent impairment of the left lower extremity.

By decision dated March 23, 2004, the Office denied an additional schedule award based on Dr. Bachman's opinion, as the weight of the medical evidence. The Office noted that he found only a 5 percent impairment of the left lower extremity, less than the 15 percent previously awarded.

Appellant requested an oral hearing, held February 14, 2005. At the hearing, he described feelings of weakness and instability in his left knee. Appellant noted taking nonprescription analgesics for pain and using an elastic brace while at work. He asserted his entitlement to receive compensation at the augmented rate as he had a minor child. Following the hearing, appellant submitted additional evidence regarding his court-ordered support obligations to his minor child.

By decision dated May 11, 2005, the Office hearing representative affirmed the Office's March 23, 2004 schedule award regarding the percentage of impairment. The hearing representative found that "Dr. Bachman's opinion was 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." The hearing representative also directed that the Office pay appellant appropriate compensation as he established entitlement to payment at the augmented rate.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees' Compensation Act[7] has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[8]

The schedule award provision of the Act[9] and its implementing regulation[10] sets forth the number of weeks of compensation payable to employees sustaining permanent impairment from

[6] Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides* is entitled, "Impairment Estimates for Certain Lower Extremity Impairments." According to Table 17-33, a partial medial or lateral meniscectomy equals a two percent impairment of the involved lower extremity.

[7] 5 U.S.C. §§ 8101-8193.

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

[9] 5 U.S.C. § 8107.

[10] 20 C.F.R. § 10.404.

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.[11]

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[12] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[13] In situations where there are apposing 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.[14]

ANALYSIS

The Office accepted that appellant sustained a left medial meniscus tear in the performance of duty on January 11, 2002 necessitating a partial medial meniscectomy on April 12, 2002. He then claimed a schedule award. Appellant submitted a March 6, 2003 report by Dr. Weiss, an attending osteopath, finding a 30 percent impairment of the left lower extremity due to weakness of the left quadriceps and gastrocnemius, as well as pain. An Office medical adviser reviewed Dr. Weiss' report and opined that appellant had only a 15 percent impairment of the left lower extremity. After issuing a schedule award on July 9, 2003, the Office vacated this decision on December 29, 2003, finding a conflict of medical opinion between Dr. Weiss and the Office medical adviser.

Pursuant to 5 U.S.C. § 8123(a), the Office appointed Dr. Bachman, a Board-certified orthopedic surgeon, as an impartial medical specialist to resolve the conflict. He submitted a February 4, 2004 report, finding a five percent impairment of the left lower extremity based on his interpretation of the A.M.A., *Guides*. This rating included a three percent impairment for loose bodies removed during the April 12, 2002 arthroscopy. However, Dr. Bachman acknowledged that there was "no table or point of reference for the loose bodies" in the A.M.A., *Guides*. Despite this irregularity, the Office issued March 23, 2004 and May 11, 2005 decisions, finding that appellant had not established that he sustained greater than a 15 percent impairment of the left lower extremity based on Dr. Bachman's opinion as the weight of the medical

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

[12] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[13] *Delphia Y. Jackson*, 55 ECAB ___ (Docket No. 04-165, issued March 10, 2004).

[14] *Anna M. Delaney*, 53 ECAB 384 (2002).

evidence. The Board finds, however, that Dr. Bachman's impairment rating does not conform to the A.M.A., *Guides*.[15]

Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical opinion evidence and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report.[16] In this case, the Office did not request a supplemental report from Dr. Bachman. Therefore, the case will be remanded for further development.

On remand of the case, the Office shall request that Dr. Bachman submit a supplemental report clarifying his previous opinion, clearly setting forth the tables and grading schemes of the A.M.A., *Guides* he relied upon in reaching the offered percentage of impairment. After this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that the case is not in posture for a decision as the case must be remanded for further development to determine the percentage of impairment of appellant's left knee.

[15] *Derrick C. Miller*, 54 ECAB 266 (2002); *James Kennedy Jr., supra* note 11 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's impairment).

[16] *Harry T. Mosier*, 49 ECAB 688 (1998).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2005 is set aside and the case remanded for further development consistent with this opinion.

Issued: January 18, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board