

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

M.W., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Southeastern, PA, Employer)

**Docket No. 06-1165
Issued: November 15, 2006**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2006 appellant filed a timely appeal of the March 6, 2006 merit decision of the Office of Workers' Compensation Programs which found a five percent impairment of the right lower extremity for which she received a schedule award. Pursuant to 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 more than a five percent impairment of the right lower extremity, for which she received a schedule award.

FACTUAL HISTORY

On February 16, 1995 appellant, then a 46-year-old clerk, filed a claim alleging that on February 9, 1995 her knees locked while she was performing her clerk duties.¹ The Office accepted her claim for a right knee contusion and a torn medial meniscus and authorized arthroscopic surgery. Appellant stopped work on February 14, 1995 and returned to a light-duty

¹ The Office developed appellant's claim as a new traumatic injury.

position on February 16, 1995 and full duty on October 19, 1995. Appropriate compensation benefits were paid for all periods of disability.

Appellant came under the treatment of Dr. Gregory J. Lignelli, a Board-certified neurosurgeon. In reports dated February 13 to October 12, 1995, he noted that she was treated for right knee pain which occurred after she fell at work. Dr. Lignelli diagnosed sprain and strain of the right knee. Other treatment notes from Dr. John J. Pell, a Board-certified orthopedic surgeon, dated December 18, 1997, noted treating appellant for persistent right knee and foot pain. A magnetic resonance imaging (MRI) scan of the right knee revealed a torn medial meniscus. Dr. Pell noted on April 9, 1998 that appellant experienced left knee pain which was attributed to the increased pressure she was putting on the left side since her right knee injury. In an operative report dated February 24, 2000, Dr. Pell performed a meniscectomy of the right knee and debridement of the right knee joint. He diagnosed degenerative arthritis of the right knee and tear of the medial meniscal cartilage of the right knee. An MRI scan of the right knee dated January 13, 1998 revealed degenerative joint disease of the patellofemoral articulation, medial meniscal tear and lateral meniscal degeneration. An MRI scan of the left knee dated June 16, 1998 revealed degenerative changes within the patellofemoral and medial femoral tibial compartments and degenerative changes of the lateral and medial meniscus with findings suspicious for a tear.²

In a December 8, 2003 report, Dr. David Weiss, an osteopath, determined that appellant reached maximum medical improvement on December 9, 2003. He diagnosed chronic post-traumatic internal derangement of the right knee with a tear of the medial meniscus, post-traumatic chondromalacia patella to the right knee, status post arthroscopic surgery with a medial meniscectomy by history, post-traumatic osteoarthritis to the right knee, derivative injury to the left knee with chondromalacia patella and aggravation of preexisting quiescent osteoarthritis to the left knee. Dr. Weiss noted that, in accordance with the A.M.A. *Guides* fifth edition,³ appellant sustained a 15 percent impairment of the right lower extremity. Range of motion for the right knee revealed flexion-extension of 1-120/140 degrees, patellofemoral compression produced crepitance at 30 degrees, tenderness noted over the medial joint line, crepitance over the lateral joint compartment and manual muscle strength testing Grades 4+/5 on the right. Dr. Weiss noted that appellant complained for right knee pain and stiffness daily with episodes of locking and instability. Under the A.M.A. *Guides*, she sustained a 12 percent impairment for 4/5 motor strength deficit of the right quadriceps muscle (right knee);⁴ and three percent for pain-related impairment. On March 8, 2004 appellant filed a claim for a schedule award.

² In letters dated March 22 and September 27, 2001, appellant requested that her claim be expanded to include the consequential injury to her left knee. The Office further developed this issue by referring her to a second opinion physician and ultimately denied her claim for a consequential injury to the left knee in Office decisions dated April 20, 2004 and May 27, 2005. Appellant, through her attorney, did not appeal these decisions to the Board and, therefore, this issue is not before the Board at this time.

³ A.M.A., *Guides* (5th ed. 2001).

⁴ A.M.A., *Guides* 532, Table 17-8.

In a report dated May 2, 2004, an Office medical adviser reviewed the record. Based on the A.M.A. *Guides*, appellant sustained a five percent impairment of the right lower extremity. The Office medical adviser noted that she would be entitled to two percent impairment for the right knee partial medial meniscectomy⁵ and three percent for pain-related impairment. Dr. Weiss noted that appellant reached maximum medical improvement on December 8, 2003.

By decision dated July 7, 2005, the Office granted appellant a schedule award for five percent impairment of the right lower extremity. The period of the award was from December 8, 2003 to March 17, 2004.

By letter dated July 11, 2005, appellant requested an oral hearing before an Office hearing representative. The hearing was held on December 19, 2005. Appellant, through her attorney, asserted that there was a conflict in opinion between Dr. Weiss and the Office medical adviser with regard to the impairment to her right lower extremity.

In a decision dated March 6, 2006, the hearing representative affirmed the July 7, 2005 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act⁶ and its implementing regulation⁷ 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.⁸

Section 8123(a) of the Act provides in pertinent part: "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 physician who shall make an examination."⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.¹⁰

⁵ *Id.* at 546, Table 17-33.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *William C. Bush*, 40 ECAB 1064 (1989).

ANALYSIS

On appeal, appellant contends that she is entitled to a schedule award greater than five percent impairment of the right lower extremity. She asserts that there is a medical conflict between the medical adviser and Dr. Weiss with regard to the impairment to her right lower extremity. The Office accepted appellant's claim for right knee contusion and torn medial meniscus of the right knee and arthroscopic surgery was authorized and performed on February 24, 2000. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Weiss, appellant's treating physician.

The Office medical adviser found that, based on the A.M.A. *Guides*, appellant sustained a five percent impairment of the right lower extremity. He allowed two percent impairment for the right knee partial medial meniscectomy¹¹ and three percent for pain. By contrast, Dr. Weiss in his report dated December 8, 2003, also applied the A.M.A., *Guides* and found that appellant sustained a 15 percent impairment rating. He determined that manual muscle strength testing produced a 4+/5 grade for the right knee, noting appellant's complaints of right knee pain and stiffness daily with episodes of locking and instability. Dr. Weiss noted that in accordance with the A.M.A. *Guides* for 4+/5 motor strength deficit of the right quadriceps muscle (right knee) appellant sustained 12 percent impairment¹² and 3 percent for pain-related impairment. He determined that the work-related injury of February 9, 1995 was the competent producing factor for appellant's subjective and objective findings described above. Dr. Weiss supported an increased impairment rating of the right lower extremity, while the Office medical adviser opined that appellant sustained no more than a five percent impairment of the right lower extremity.

The Board finds that the Office should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of impairment arising from appellant's accepted employment injury.

Therefore, in order to resolve the conflict in the medical opinions the case will be remanded to the Office for referral of the case record, including a statement of accepted facts and, if necessary, appellant, to an impartial medical specialist for a determination regarding the extent of her right lower extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*.¹³ After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's right lower extremity impairment.

¹¹ A.M.A., *Guides* 546, Table 17-33.

¹² See *supra* note 4.

¹³ See *Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2006 and July 7, 2005 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: November 15, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board