United States Department of Labor
Employees' Compensation Appeals Board

A.L., Appellant	)	
	)	**Docket No. 07-209**
and	)	**Issued: April 10, 2007**
	)	
U.S. POSTAL SERVICE, POST OFFICE, New Brunswick, NJ, Employer	)	

Appearances:
Robert D. Campbell, 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 October 30, 2006 appellant filed a timely appeal of the August 4, 2006 schedule award decision of the Office of Workers' Compensation Programs. 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 on appeal is whether the Office properly determined that appellant had no more than a five percent permanent impairment of the left lower extremity for which he received a schedule award.

FACTUAL HISTORY

On September 29, 2004 appellant, then a 42-year-old letter carrier, filed a traumatic injury claim when he felt a pop in his left knee while delivering mail. The Office accepted appellant's claim for a left knee tear and authorized arthroscopic surgery, for a partial medial meniscectomy, which was performed on February 1, 2005. Appellant stopped work on

September 29, 2004 and returned to a light-duty position on October 12, 2004. Appropriate compensation benefits were paid for all periods of disability.

Appellant came under the treatment of Dr. Jeffrey M. Warshauer, an osteopath, who noted in reports dated September 30 to October 21, 2004 that appellant was treated for left knee pain which occurred after he twisted his knee at work. A magnetic resonance imaging scan of the left knee dated October 14, 2004 revealed status post acromioclavicular tear repair with intact appearing graft. In an operative report dated February 1, 2005, the physician performed arthroscopy, partial medial meniscectomy of the left knee and synovectomy and diagnosed torn medial meniscus of the left knee and synovitis of the left knee. In reports dated February 7 to June 6, 2005, Dr. Warshauer noted appellant's continued treatment for mild pain and mild patellofemoral crepitus.

Appellant submitted a report from Dr. David Weiss, an osteopath, dated May 25, 2005, who determined that appellant reached maximum medical improvement on May 23, 2005. Dr. Weiss diagnosed post-traumatic internal derangement to the left knee with a tear of the medial meniscus, post-traumatic synovitis to the left knee, aggravation of preexisting left knee pathology, status post arthroscopic surgery with partial medial meniscectomy to the left knee with synovectomy and post-traumatic chondromalacia patella to the left knee. He noted that, in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition,[1] appellant had 13 percent impairment of the left leg. Dr. Weiss noted that range of motion for the left knee revealed flexion-extension of 0-100/140 degrees, patellofemoral compression produced crepitus and pain, tenderness noted over the medial joint line and medial joint space and manual muscle strength testing Grades 5/5 on the left. He noted appellant complaints for left knee pain and stiffness daily with episodes of swelling and instability. Dr. Weiss noted that in accordance with the A.M.A., *Guides* appellant sustained 10 percent impairment for a deficit in flexion of the left knee[2] and 3 percent for pain-related impairment.[3]

On July 22, 2005 appellant filed a claim for a schedule award.

Dr. Weiss' report and the case record were referred to the Office medical adviser who, in a report dated October 10, 2005, advised that based on the A.M.A., *Guides* appellant sustained a seven percent impairment of the left leg. He noted that appellant would be entitled to seven percent impairment for mild cruciate or collateral ligament laxity of the left knee.[4] Dr. Weiss noted that appellant reached maximum medical improvement on May 23, 2005.

On November 2, 2005 the Office referred appellant for a second opinion to Dr. Iqbal Ahmad, a Board-certified orthopedist. The Office provided Dr. Ahmad with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment

[1] A.M.A., *Guides* (5th ed. 2001).

[2] *See* Table 17-10, page 537 (A.M.A., *Guides*).

[3] Figure 18-1, page 574 (A.M.A., *Guides*).

[4] *See* Table 17-33, page 546 (A.M.A., *Guides*).

duties. In a medical report dated November 23, 2005, Dr. Ahmad indicated that he reviewed the records provided to him and performed a physical examination of appellant. He indicated the history of appellant's work-related injury. Dr. Ahmad noted findings upon physical examination of the left knee revealed normal extension, flexion measured 140 degrees, there was tenderness on the medial and lateral aspect, there was no muscle atrophy and muscle strength was equal bilaterally. He diagnosed internal derangement and arthroscopy of the left knee, medial meniscectomy and synovectomy and prior surgical repair of the anterior cruciate ligament. Dr. Ahmad indicated that, in accordance with the fifth edition of the A.M.A., *Guides*,[5] appellant sustained a two percent impairment of the left lower extremity for range of motion deficit;[6] and a one percent impairment due to pain.

Dr. Ahmad's report and the case record were referred to the Office medical adviser who, in a report dated January 22, 2006, advised that based on the A.M.A., *Guides* appellant sustained a three percent impairment of the left lower extremity. He noted that appellant would be entitled to two percent impairment for a deficit in flexion of 140 degrees;[7] and one percent for pain-related impairment.[8]

By decision dated March 10, 2006, the Office granted appellant a schedule award for three percent permanent impairment of the left lower extremity. The period of the award was from November 23, 2005 to January 22, 2006.

By letter dated June 5, 2006, appellant requested reconsideration. He submitted a report from Dr. Weiss dated May 4, 2006. Dr. Weiss referenced his report of May 23, 2005 and indicated that in accordance with the A.M.A., *Guides* he determined that appellant had 13 percent permanent impairment of the left leg. He noted that range of motion for the left knee revealed flexion-extension of 100 degrees for 10 percent impairment[9] and noted an additional 3 percent for pain-related impairment.[10] Dr. Weiss indicated that Figure 18-1 of the A.M.A., *Guides* provides that if pain-related impairment appears to increase the burden of appellant's condition slightly, the examiner can increase the percentage by three percent. He noted that at the time of the examination appellant's pain level was graded at 6/10 in the left knee and he had difficulties with activities of daily living. Dr. Weiss referenced the medical adviser's report of October 7, 2005, which provided a seven percent impairment for mild laxity and noted that the examiner could not use a diagnostic impairment rating along with range of motion deficit rating and opined that the range of motion deficit better described appellant's impairment.

[5] *See supra* note 1.

[6] *See supra* note 4.

[7] *See supra* note 2.

[8] *See supra* note 3.

[9] *See supra* note 2.

[10] *See supra* note 3.

Dr. Weiss' reports and the case record were referred to the Office medical adviser who, in a report dated July 12, 2006, advised that based on the A.M.A., *Guides* appellant had five percent impairment of the left leg. He noted that range of motion for the left knee for flexion was 140 for a 0 percent impairment rating;[11] extension was normal for a 0 percent impairment rating;[12] appellant underwent a partial medial meniscectomy for a 2 percent impairment rating;[13] and noted an additional 3 percent for pain-related impairment.[14]

In a decision dated August 4, 2006, the Office granted appellant an additional award of two percent permanent impairment of the left lower extremity for a total award of five percent permanent impairment of the left lower extremity. The Office noted that appellant was previously granted a three percent permanent impairment of the left lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[15] and its implementing regulation[16] 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.[17]

ANALYSIS

On appeal, appellant asserts that he is entitled to a schedule award greater than five percent permanent impairment of the left leg. He contends that there is a medical conflict between the medical adviser and Dr. Weiss with regard to the impairment to his left lower extremity. The Office accepted appellant's claim for left knee tear and arthroscopic surgery was authorized and performed on February 1, 2005. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Weiss, appellant's treating physician.

[11] *See supra* note 2.

[12] *Id.*

[13] *See supra* note 4.

[14] *See supra* note 3.

[15] 5 U.S.C. § 8107.

[16] 20 C.F.R. § 10.404 (1999).

[17] *See id.*; *Jacqueline S. Harris*, 54 ECAB 139 (2002).

The Office medical adviser who, in a report dated July 12, 2006, advised that based on the A.M.A., *Guides* appellant sustained a five percent impairment of the left lower extremity. He noted that appellant would be entitled to two percent impairment for the left knee partial medial meniscectomy[18] and three percent for pain-related impairment.[19] By contrast, Dr. Weiss in his reports dated May 25, 2005 and May 4, 2006 also applied the A.M.A., *Guides* and found that appellant sustained a 13 percent impairment rating. He determined that in accordance with the A.M.A., *Guides* range of motion for the left knee revealed flexion-extension of 100 degrees for 10 percent impairment[20] and 3 percent for pain-related impairment.[21] Dr. Weiss supported an increased impairment rating of the left lower extremity, while the Office medical adviser opined that appellant sustained no more than a five percent permanent impairment of the left lower extremity. Also, both ratings include pain-related impairment.[22]

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."[23] 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.[24] The Board finds that the Office should have referred appellant to an impartial medical specialist to resolve the medical conflict regarding the extent of permanent 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 appellant's left lower extremity impairment as determined in accordance with the relevant standards of the A.M.A., *Guides*.[25] After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left lower extremity impairment.

---

[18] *See supra* note 4.

[19] *See supra* note 3.

[20] *See supra* note 2.

[21] *See supra* note 3.

[22] The Board notes that each physician erroneously attributed pain-related impairment under Chapter 18 of the A.M.A., *Guides*. *See id*. The Board has held that physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. *See Frantz Ghassan*, 57 ECAB ___ (Docket No. 05-1947, issued February 2, 2006); *Linda Beale*, 57 ECAB ___ (Docket No. 05-1536, issued February 15, 2006).

[23] 5 U.S.C. § 8123(a).

[24] *William C. Bush*, 40 ECAB 1064, (1989).

[25] *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 August 4 and March 10, 2006 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: April 10, 2007
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