United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
	)	**Docket No. 07-829**
and	)	**Issued: August 20, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 February 2, 2007 appellant filed a timely appeal from a January 25, 2007 decision of the Office of Workers' Compensation Programs adjudicating his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has more than a 19 percent permanent impairment of his left lower extremity or any impairment of his right lower extremity or right upper extremity.

FACTUAL HISTORY

On February 18, 2005 appellant, then a 53-year-old letter carrier, filed a claim for a traumatic injury alleging that on February 17, 2005 he was injured when he was struck by a motor vehicle while walking his delivery route. The Office accepted his claim for a contusion and fracture of the left ankle, a fracture of the right patella, a sprain and strain of the right rotator cuff, a contusion of the right chest wall, a collapsed right lung and pneumonia. On

September 22, 2005 the Office expanded the claim to accept a cervical strain and aggravation of a torn left medial meniscus. On March 30, 2006 appellant filed a claim for a schedule award. On April 14, 2006 he underwent arthroscopic surgery, including a partial medial and lateral meniscectomy, chondral shaving of the medial compartment and patella femoral joint and ablation.

In a report dated October 13, 2006, Dr. Richard I. Zamarin, an attending Board-certified orthopedic surgeon, determined that appellant had a 10 percent impairment of the left lower extremity for a partial medial and lateral meniscectomy, based on Table 17-33 at page 546 (the diagnosis based estimate rating method) of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*[1] and a 17 percent impairment of the left lower extremity for gait derangement, based on Table 17-5 at page 529. He also determined that appellant had a 7 percent impairment of the right lower extremity for a patellar fracture, based on Table 17-33 at page 546 of the A.M.A., *Guides.* Dr. Zamarin determined that appellant had a three percent impairment of the right upper extremity for moderate pain in his right shoulder, based on Table 18-3 at page 575 and Figure 18-1 at page 574.

On December 28, 2006 Dr. Arnold T. Berman, an Office medical adviser,[2] found that appellant had a 19 percent combined impairment of the left lower extremity, including 10 percent for a partial medial and lateral meniscectomy and 7 percent for a patellar fracture, based on Table 17-33 at page 546 of the A.M.A., *Guides* and 3 percent for pain, based on Figure 18-1 at page 574. He stated that no impairment could be granted for the left lower extremity based on arthritis because the arthritis was very advanced and preexisted the employment injury and "I would not conclude that the injury aggravated the preexisting arthritis." Regarding the 17 percent for gait derangement for the left lower extremity found by Dr. Zamarin, Dr. Berman stated that gait derangement could not be combined with a diagnosis based estimate according to Table 17-2 at page 526 of the A.M.A., *Guides*, the Cross-Usage Chart. He stated that appellant had subjective complaints regarding his right shoulder but there was no ratable impairment.

On January 25, 2007 the Office granted appellant a schedule award for 54.72 weeks[3] from October 13, 2006 to October 31, 2007 based on a 19 percent impairment of his left lower extremity.

[1] A.M.A., *Guides* (5th ed. 2001). Dr. Zamarin noted that the 10 percent impairment for a meniscectomy could be combined with the arthritis rating method under the A.M.A., *Guides*, but there were no x-rays available for review.

[2] *See* Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (these procedures contemplate that, after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

[3] The Federal Employees' Compensation Act provides for 288 weeks of compensation for 100 percent loss or loss, of use of a lower extremity. 5 U.S.C. § 8107(c)(2). Multiplying 288 weeks by 19 percent equals 54.72 weeks of compensation.

LEGAL PRECEDENT

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]

Section 8123(a) of the Act provides that "if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination."[7]

ANALYSIS

The Board finds that there is a conflict in the medical opinion evidence between Dr. Zamarin and Dr. Berman, necessitating referral to an impartial medical specialist. Further development of the medical evidence is necessary to determine whether appellant has more than a 19 percent impairment of his left lower extremity or any impairment of his right lower extremity and right upper extremity.[8]

Dr. Zamarin determined that appellant had a 10 percent impairment of the left lower extremity for a partial medial and lateral meniscectomy, based on Table 17-33 at page 546 of the A.M.A., *Guides* and a 17 percent impairment of the left lower extremity for gait derangement, based on Table 17-5 at page 529. Dr. Berman agreed that appellant had a 10 percent impairment of the left lower extremity due to his partial medial and lateral meniscectomy. He also found a 7 percent impairment of the left lower extremity for a patellar fracture. However, the record shows that the patellar fracture was to the right lower extremity, not the left. Dr. Berman correctly noted that the gait derangement rating method cannot be combined with the diagnosed based estimate rating method according to the Cross-Usage Chart, Table 17-2 at page 526. Dr. Zamarin indicated that appellant could have impairment due to arthritis but no x-rays were in the record with which to measure cartilage level. Dr. Berman disagreed with Dr. Zamarin

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.*

[7] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[8] As noted, appellant's accepted conditions include a fracture of the left ankle and aggravation of a torn left medial meniscus, a fracture of the right patella, a sprain and strain of the right rotator cuff, a contusion of the right chest wall, a cervical strain, a collapsed right lung and pneumonia. He underwent a partial medial and lateral meniscectomy.

regarding impairment due to arthritis, stating that no impairment could be granted for the left lower extremity because, in his opinion, the employment injury did not aggravate appellant's preexisting arthritis.[9] Regarding impairment due to pain, both Dr. Berman and Dr. Zamarin found that appellant had a three percent impairment due to pain, based on Chapter 18. However, the physicians did not support, with medical rationale, the calculation of a three percent left lower extremity impairment based on Chapter 18 of the A.M.A., *Guides*. Section 18.3b of Chapter 18 at page 571 of the fifth edition of the A.M.A., *Guides* provides that "Examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the [A.M.A.,] *Guides*." Dr. Zamarin and Dr. Berman did not explain why appellant's pain-related impairment could not be adequately addressed by applying Chapter 17 of the A.M.A., *Guides* which addresses lower extremity impairment, specifically section 17.2l, "Peripheral Nerve Injuries" which states that, "Partial sensory and motor deficits should be rated as in the upper extremity (Tables 16-10 and 16-11)." Table 16-10 explains the correct method for calculating impairment due to sensory deficits or pain resulting from peripheral nerve disorders. Dr. Zamarin and Dr. Berman did not explain why application of Chapter 17 was not adequate to calculate appellant's impairment due to left lower extremity pain, justifying application of Chapter 18 of the A.M.A., *Guides*.

Regarding appellant's right lower extremity, Dr. Zamarin determined that appellant had a seven percent impairment of the right lower extremity for a patellar fracture, based on Table 17-33 at page 546 of the A.M.A., *Guides.* As noted, Dr. Berman found a seven percent impairment for a patellar fracture but erroneously indicated that the fracture was to the left lower extremity.

Regarding impairment to appellant's right upper extremity, Dr. Berman found that he had a three percent impairment for pain in his right shoulder, based on Table 18-3 at page 575 and Figure 18-1 at page 574 of the A.M.A., *Guides*.[10] However, Dr. Berman found no ratable impairment of appellant's right upper extremity.

On remand the Office should refer appellant to an appropriate Board-certified medical specialist for a determination of any impairment of his left and right lower extremities and right upper extremity based on correct application of the A.M.A., *Guides*. The physician should provide medical rationale explaining why a particular rating method was selected. If more than one impairment rating method can be used in evaluating appellant's impairment, the method that provides the higher rating should be adopted.[11]

[9] The Board notes that the arthritis rating method and diagnosis-based estimate rating method can be combined according to the Cross-Usage Chart, Table 17-2 at page 526 of the A.M.A., *Guides.*

[10] Dr. Zamarin did not explain why Chapter 16 of the A.M.A., *Guides*, regarding upper extremity impairment was not adequate to rate appellant's impairment due to pain, rather than Chapter 18.

[11] A.M.A., *Guides* 527.

CONCLUSION

The Board finds that this case is not in posture for a decision. On remand, the Office should refer appellant to an appropriate Board-certified medical specialist for an impairment rating of his left and right lower extremities and right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 25, 2007 is set aside and the case is remanded for further development consistent with this decision.

Issued: August 20, 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