United States Department of Labor
Employees' Compensation Appeals Board

O.C., Appellant	)	
and	)	**Docket No. 07-535**
	)	**Issued: September 17, 2007**
U.S. POSTAL SERVICE, EL PASO MANAGEMENT CENTER, El Paso, TX, Employer	)	

Appearances:
Linda Temple, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 18, 2006 appellant, through his representative, filed a timely appeal from a decision of the Office of Workers' Compensation Programs' hearing representative dated July 24, 2006 finding that he was not entitled to an increased schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merit issue of the case.[1]

ISSUE

The issue is whether appellant has more than a 12 percent impairment to his right lower extremity.

FACTUAL HISTORY

On September 6, 1996 appellant, then a 54-year-old letter carrier, filed an occupational disease claim alleging that, due to carrying a heavy load for 30 years, he developed problems

[1] On appeal, appellant is only contesting the percentage of the schedule award for the impairment to his right lower extremity.

with his knees. On October 9, 1996 the Office accepted his claim for chondromalacia patella and dislocation of the right knee. On January 14, 1998 appellant received a schedule award for a 10 percent permanent impairment to the right lower extremity. On February 26, 2001 the Office accepted his claim for dislocation of the right knee and torn medial meniscus of the left knee.

In a report dated October 10, 2001, Dr. Richard S. Westbrook, a Board-certified orthopedic surgeon, noted that appellant's chief complaint was "medial meniscal tear of the right knee." He diagnosed osteoarthritis of the knee, medial meniscal tear and chondromalacia of the patella and indicated that appellant had reached maximum medical improvement (MMI).

> "[Appellant] has been reviewed as far as impairment rating from the [A.M.A., *Guides*]. According to the [f]ifth [e]dition, [appellant] has a 10 percent lower extremity impairment secondary to the narrowing of the patellofemoral joint of two millimeters (mm) and a 7 percent lower extremity impairment secondary to the narrowing of the knee joint at three mm by [A.M.A., *Guides* 544,] [T]able 17-31. [Appellant's] range of motion is 0 to 120 degrees as compared to the 0 to 140 degrees on the opposite knee by extrapolating from the value of 110 degree knee range of motion. Because of loss of the medial meniscus, [he] has an additional two percent lower extremity impairment. The previous impairment rating given to [appellant] was a 10 percent lower extremity impairment in the past because of this meniscal injury. Because of the meniscal injury and the necessity for meniscectomy, [appellant] has had a progression of his arthritic changes in his knee recently has a 14 percent increase in the lower extremity impairment (this equals a 6 percent whole person impairment in addition to his previous impairment).

The Office referred appellant's case to the Office medical adviser. In a report dated October 10, 2002, he stated:

> "Dr. Westbrook reports right knee arthroscopy [status postoperative] partial medial meniscectomy, osteoarthritis, patellar chondromalacia, stable knee, [range of motion 0/120 degrees] and a 24 [percent] lower extremity impairment consisting of 17 [percent]. For arthritis (two [mm] patellofemoral cartilage interval and three mm knee cartilage interval), five [percent] for limited [range of motion], a two [percent] for partial meniscectomy.
>
> "Based upon the [A.M.A., *Guides*] and the report from Dr. Westbrook, I am able to make the following determination:
>
>> Arthritis [A.M.A., *Guides* 544, Table 17-31] -- right
>>
>> Knee-Patellofemoral Cartilage Interval -- 2 mm -- 10 [percent right lower extremity].
>>
>> Diagnosis-based Estimate [A.M.A., *Guides* 546, Table 17-33).
>>
>> Knee -- Meniscectomy -- Partial -- Medial -- 2 [percent right lower extremity.]

> Combine [A.M.A., *Guides* 604] 10 [percent] and 2 [percent] is 12 [percent right lower extremity]. "No consideration is given for [range of motion] deficit in addition to arthritis, because this would be contrary to the [C]ross-[U]sage [C]hart [A.M.A., *Guides* 526, Table 17-2]. Likewise, in my opinion, to consider patellofemoral arthritis and knee arthritis separately would be duplication because arthritis involves the entire joint.
>
> "I was unable to find an evaluation of the left lower extremity.
>
> "A previous schedule award for the [right lower extremity] was determined by [a previous Office medical adviser] to be 10 [percent,] based upon range of motion of the knee. This schedule award for the [right lower extremity] is an additional two [percent right lower extremity].

On April 18, 2002 appellant had an arthroscopy with partial medial meniscectomy and partial synovectomy.

In a February 9, 2003 report, Dr. Westbrook clarified his earlier opinion, stating:

> "[Appellant] had a 10 [percent] impairment of the lower extremity given for prior injuries. [He] has increased the lower extremity impairment to 24 [percent] because of the arthritic changes that he has in his [right] knee because of the meniscal injuries that [appellant] sustained in the most recent injury. This gives an additional 14 [percent] lower extremity impairment to [appellant] which equals an additional 6 [percent] whole person impairment for [appellant] for both lower extremity, *i.e.*, both knee injuries."

By decision dated February 20, 2003, the Office granted a schedule award for two percent impairment of the right lower extremity. This was in addition to the schedule award for a 10 percent permanent impairment previously awarded.

By letter dated February 25, 2003, appellant requested review of the written record. By decision dated July 2, 2003, the hearing representative affirmed the February 20, 2003 decision.

On February 25, 2004 appellant filed a claim for an additional schedule award. On January 26, 2005 the Office found that the evidence submitted was insufficient to modify the prior decision awarding a 12 percent impairment to appellant's right lower extremity. On January 28, 2005 the Office issued a schedule award for a 12 percent impairment of the left lower extremity.

On March 26, 2005 appellant requested reconsideration. In a report dated March 16, 2005, Dr. Westbrook stated that appellant was entitled to a greater schedule award for his right knee. He stated:

> "By the [A.M.A., *Guides*], there are two areas when using Table 17-31. One table is for whole person impairment, arthritis impairments based on roetgengoraphically determined cartilage intervals. There is one impairment for the knee and one impairment for the patellofemoral joint. I have tried to explain

this in the previous letters. I have given [appellant] two impairment ratings; one for the knee joint, *i.e*., the joint between the tibia and the femur, another impairment rating for the impairment between the kneecap and the femur, *i.e*., the patellofremoral joint.

"As noted in my letter of February 9, 2003, [appellant] had a previous impairment because of the loss of cartilage in his knee. This has been increased from 10 [percent] impairment of the lower extremity to 24 [percent] impairment of the lower extremity secondary to the progressive arthritic changes, as viewed by x-ray.

"[Appellant] has a patellofemoral joint space of 2 [mm], which according to the guidelines from Table 17-3[1],[2] is a 10 [percent] lower extremity impairment. [He] has a 3 mm narrowing in the joint space of the knee, *i.e*., between the femur and the tibia, which is a 7 [percent] impairment. This gives an increase in [appellant's] impairment, as noted above, to 14 percent over his previous impairment. I am using the [A.M.A.,] *Guides* as prescribed the U.S. Department of Labor and that is the [A.M.A.,*Guides*].

By letter dated May 8, 2006, the Office referred appellant to Dr. Randy Pollet, a Board-certified orthopedic surgeon, for a second opinion. In a report dated June 14, 2006, Dr. Pollet stated:

"At this time, after reviewing multiple medical records, clinical notes and records that were submitted to this office and referring to page 546, [T]able 17-33 in the [A.M.A., *Guides*, appellant] was found to have one [percent] impairment of the right, one [percent] impairment whole body concerning the injuries to the right knee, and one [percent] impairment for the left knee.

"There was no significant atrophy, no instability, no joint swelling and most of the changes were age related and related to osteoarthritis and again and probably not repetitive activities.

"[Appellant] had successful surgery and according to [T]able 17-33 for partial medial or lateral meniscectomy, he should be ordered one [percent] impairment, one [percent] injuries to the right knee and one percent injuries to the left knee, A.M.A., *Guides* (5th ed.)"

On June 22, 2006 the Office referred Dr. Pollet's report to the Office medical adviser. In a report dated July 12, 2006, the Office medical adviser noted:

"I have reviewed the record and the [statement of accepted facts] of [appellant] on this date. The recommendations regarding the [s]cheduled [a]ward for him are based on the record and the [A.M.A., *Guides*].

[2] The Board notes that Dr. Westbrook's report contains a typographical error in that the correct Table is 17-31 and not 17-32 as indicated.

"[Appellant] has accepted conditions derangement of both knees with surgeries.... I have been asked to review the report of Dr. Pollet dated [June 7, 2006] for the purpose of determining impairment for the lower extremities.

"MMI was achieved June 7, 2006 (date of evaluation).

"Determination of permanent impairment for the [right lower extremity] is as follows:

> "Dr. Pollet first recommends two [percent permanent impairment] for the [right lower extremity] based on partial meniscectomy. After reviewing the operative note [August 13, 1996), he notes that plica resection was performed, not menisectomy. [Dr. Pollet] recommends [zero percent permanent impairment] for the [right lower extremity].

"Permanent impairment of the [right lower extremity] is zero [percent].

The Office medical adviser also noted no additional impairment to appellant's left lower extremity.

In a decision dated July 24, 2006, the Office found that modification of the earlier decision was not warranted, as there was no basis for an additional or supplemental award to either lower extremity.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulation[4] 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.[5]

ANALYSIS

On appeal, appellant asserts that he has greater than 12 percent impairment of his right lower extremity.[6]

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[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404.

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

[6] Appellant does not contest the amount of the schedule award to his left lower extremity.

Dr. Westbrook, appellant's treating physician, indicated in an August 2001 report, that appellant had a narrowing of the patellofemoral joint space of two mm which according to Table 17-31 of the A.M.A., *Guides*[7] equals a 10 percent impairment of the left lower extremity. He further noted, by use of the same table,[8] that appellant had a three mm narrowing in the joint space of the knee between the femur and the tibia which is a seven percent impairment according to the A.M.A., *Guides*. Dr. Westbrook also noted that appellant had a two percent impairment due to the right lower extremity due to the loss of the medial meniscus. He also noted that appellant would be entitled to an extra five percent lower extremity impairment according to the A.M.A., *Guides* due to loss of range of motion. Accordingly, Dr. Westbrook opined that appellant had a total of a 24 percent impairment to the right lower extremity or 14 percent more than the 10 percent appellant had previously been awarded. However, his estimate of impairment did not take the Cross-Usage Chart into consideration. Range of motion loss may not be combined with arthritis impairment.

The Office referred this report to the Office medical adviser, who determined that appellant was only entitled to a two percent increase based on the partial meniscectomy of his knee. He correctly noted that no consideration should be given for range of motion deficit because that would be contrary to the Cross-Usage Chart at Table12-2. However, the Office medical adviser disagreed with Dr. Westbrook with regard to the seven percent impairment rating that Dr. Westbrook found due to narrowing of the knee joint by three mm. He opined that to consider patellofemoral arthritis and knee arthritis separate would be duplication because arthritis involves the entire joint. The Office medical adviser provided no support for this assertion. The Board notes that Table 17-31, page 544, of the A.M.A., *Guides* allows separate ratings for loss of patellofemoral cartilage interval and knee cartilage interval.[9]

The Board finds that the case is not in posture for decision. The case will be remanded to the Office for further medical opinion on the extent of permanent impairment to appellant's right lower extremity. 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.

<u>CONCLUSION</u>

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

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[7] *See* A.M.A., *Guides* 544, Table 17-31.

[8] *Id.*

[9] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 24, 2006 is set aside and the case is remanded for further action consistent with this opinion.

Issued: September 17, 2007
Washington, DC

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

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