United States Department of Labor
Employees' Compensation Appeals Board

I.N., Appellant	)	
and	)	**Docket No. 07-809**
	)	**Issued: February 1, 2008**
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 January 23, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 26, 2006 schedule award decision. Under 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 is entitled to an impairment greater than a 31 percent permanent impairment of the left lower extremity and a 10 percent permanent of the right lower extremity.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 32-year-old temporary supervisor, injured his back, head and both knees in an automobile accident. He filed a claim for benefits, which the Office accepted for cervical spine strain, lumbosacral strain and contusion of both knees. The claim was subsequently expanded to include the condition of dysthymic disorder. By decision dated August 16, 1997, the Office terminated appellant's compensation and entitlement to

medical benefits. By merit decision dated November 14, 1997 and nonmerit decision dated February 2, 1999, the Office denied modification. In an April 16, 2001 decision,[1] the Board affirmed the Office's February 2, 1999 nonmerit decision. The complete facts of this case are set forth in the Board's April 16, 2001 decision and are herein incorporated by reference.

On April 26, 2006 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left and right lower extremities. In support of his request, appellant submitted an impairment rating evaluation from July 21 and December 8, 2005 from Dr. George Rodriguez, Board-certified in physical medicine and rehabilitation. Using the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) he found that appellant had a right lower extremity impairment of 26 percent and a left lower extremity impairment of 55 percent. Dr. Rodriguez rated a 1 percent impairment for sensory root impairment, finding that appellant had a Grade 4 impairment at S1, which yielded 25 percent out of a maximum 5 percent deficit under Tables 15-15 and 15-18 at page 424 of the A.M.A., *Guides*; an impairment for arthritis of the left knee based on zero millimeters of remaining cartilage in the knee, which corresponded to a full thickness cartilage tear, rating a 50 percent impairment at Table 17-31, page 544 of the A.M.A., *Guides*; and an impairment for chondromalacia based on a minimal patellofemoral impairment, rating a 10 percent impairment at Table 17-31, for a combined 55 percent left lower extremity impairment.

Regarding the right lower extremity, Dr. Rodriguez rated a total 26 percent impairment. He arrived at this figure by calculating an impairment for arthritis of the right knee based on one millimeter of remaining cartilage in the knee, which corresponded to mild cartilage thinning, rating a 7 percent impairment at Table 17-31, page 544 of the A.M.A., *Guides*; and an impairment for chondromalacia based on a full thickness cartilage defect of three millimeters, which corresponded to a maximum patellofemoral impairment, rating a 20 percent impairment at Table 17-31, for a combined 26 percent left lower extremity impairment.

In a report dated May 17, 2006, an Office medical adviser found that appellant had a one percent left upper extremity impairment pursuant to the A.M.A., *Guides* (fifth edition). He stated:

> "[Appellant] does continue to have low back pain with radiation to the left lower extremity. Therefore, it appears that there is a legitimate radiculopathy which should be addressed as part of the schedule award despite the fact that the sensation strength and reflexes are normal and the magnetic resonance imaging [MRI] scan is not as recent as we would like.
>
> "[Appellant's] knee complaints continue with pain in both knees and is described as intermittent during prolonged standing as well as ascending the stairs," on page 2 of Dr. Rodriguez's report. Therefore, he does not appear to be seriously disabled from this although based on the MRI [scan] studies there is an impairment as defined by the A.M.A., *Guides*. Based on roentgenographic findings, despite the fact that the clinical findings are not significant.

[1] Docket No. 99-1375 (issued April 16, 2001).

"Therefore, it would be my recommendation based upon the A.M.A., *Guides*, Table 15-18, Unilateral Spinal Nerve Root Impairment Affecting The Lower Extremity, using the S1 nerve root, maximum percent loss of function due to sensory deficit or pain, is maximum five percent. Using the Table 15-15, page 424, determining impairment due to sensory loss, Grade 4, 25 percent is utilized. 25 percent times 5 percent maximum sensory deficit or pain equals 1.25 percent. Therefore, [appellant] should be awarded one percent impairment of the left upper extremity based on lumbar spine radiculopathy and S1 root sensory impairment.

"The only award that should be made in this case based on the current accepted conditions is therefore, for sensory root impairment, left lower extremity impairment of one percent.

"If we will utilize the accepted condition of the May 17, 2006 memo of lumbar region and neck complaints only, then the total schedule award would be one percent for the left lower extremity based on knee impairment.

"It is interesting to note that Dr. Richard H. Kaplan examined [appellant] on many occasions, and although he referred on many of these examination dates in 2002 and 2003 that [appellant] had leg pain, he never attributed this leg pain to any knee abnormalities, and further, as his treating physician, never made any reference to knee pain. Therefore, if the decision was made to exclude the knee aspect, and that it ultimately not be included in the accepted conditions, I believe this would be reasonable.

"If, on the other hand, the decision was made to include the knee as an accepted condition, it would be possible to calculate a schedule award based on radiologic findings, despite the fact that his examination shows no significant abnormalities it would be reasonable to conclude that his underlying osteoarthritis of his left knee predated his reported injuries and were not worsened, were not aggravated, and were not affected by his work-related injuries.

"Therefore, based upon the May 17, 2006 memorandum of the lumbar region and neck pain being the accepted conditions, we must reject the left lower extremity impairment of 55 percent as proposed by Dr. Rodriguez."

In a memorandum dated June 2, 2006, the Office determined that the Office medical adviser improperly excluded appellant's accepted bilateral knee conditions in his schedule award calculation. The Office therefore asked the Office medical adviser to amend his May 18, 2006 report to include appellant's accepted bilateral knee conditions in a supplemental impairment evaluation.

In his amended report dated June 2, 2006, an Office medical adviser found that appellant had a 31 percent left lower extremity impairment and a 10 percent right lower extremity impairment pursuant to the A.M.A., *Guides* (fifth edition). He stated:

"The MRI [scan] of the left knee performed December 8, 2005 revealed thinning of the cartilage with chondromalacia and a five millimeter full thickness cartilage

thickness along the posterolateral tibial plateau with reactive edema, according to the reports quoted in Dr. Rodriguez's report.

"Using page 544 of the A.M.A., *Guides*, Table 17-31, *Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals*, it would be my recommendation that the right knee should be awarded 10 percent impairment based on two percent millimeter interval of the patellofemoral articulation resulting in 10 percent impairment to the right lower extremity. The left knee has knee arthritis with loss of cartilage two millimeters remaining which is 20 percent impairment, and minimal loss of patellofemoral articulation which results in 10 percent impairment. Because the findings come from the same table, they can be added. This results in 30 percent impairment.

"Therefore, it would be my recommendation based on the arthritic changes, [appellant] has a left lower extremity impairment of 30 percent and right lower extremity impairment of 10 percent.

"I believe that Dr. Rodriguez's estimates of cartilage loss were excessive, and we should not accept his recommendation for 55 percent left lower extremity impairment and 26 percent right lower extremity impairment since the cartilage intervals are more appropriately recognized by the schedule award that I recommended."

The Office medical adviser added the 1 percent impairment he previously calculated for the left lower extremity based on sensory deficit for a total 31 percent left lower extremity impairment.[2]

On June 26, 2006 the Office granted appellant a schedule award for a 31 percent permanent impairment of the left lower extremity and a 10 percent permanent impairment of the right lower extremity for the period December 8, 2005 to March 13, 2008, for a total of 118.08 weeks of compensation.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees' Compensation Act[3] sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[4] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the

[2] The one percent impairment based on sensory deficit is not contested on appeal.

[3] 5 U.S.C. §§ 8101-8193*; see* 5 U.S.C. § 8107(c).

[4] 5 U.S.C. § 8107(c)(19).

Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[5]

ANALYSIS

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

In the present case, there was disagreement between the Office medical adviser and Dr. Rodriguez regarding the degree of impairment in his lower extremities to which appellant was entitled due to his work-related knee conditions. While both physicians relied on Table 17-31 on page 544 to calculate an impairment based on loss of cartilage, the Office medical adviser, relying on Dr. Rodriguez's findings and calculations, found in his June 2, 2006 report that appellant had a 31 percent impairment of his left lower extremity and a 10 percent impairment of his right lower extremity based on the A.M.A., *Guides*. He rejected Dr. Rodriguez's calculation of a 50 percent left lower extremity impairment based on full cartilage tear of the left knee. Although Dr. Rodriguez stated that the December 8, 2005 left knee MRI scan results showed a full loss of cartilage, zero millimeters of thickness, along the posterolateral tibial plateau with reactive edema, the Office medical adviser differed from Dr. Rodriguez in his interpretation of the December 2005 MRI scan results. The Office medical adviser found that, pursuant to Table 17-31, *Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals*, the MRI scan results showed only a moderate loss of cartilage with two millimeters of thickness remaining, which yielded a 20 percent left lower extremity impairment at Table 17-31. The Office medical adviser agreed with Dr. Rodriguez's finding of an impairment of the left lower extremity for chondromalacia, which equated to a minimal patellofemoral impairment of 10 percent at Table 17-31, which he combined with the finding above for a 30 percent left lower extremity impairment. The Office medical adviser also awarded an impairment of the right lower extremity for chondromalacia based on a two millimeter interval of the patellofemoral articulation, which equated to a minimal patellofemoral impairment of 10 percent for the right knee at Table 17-31; however, this was in contrast to Dr. Rodriguez's award for right lower extremity impairment for chondromalacia based on a full thickness cartilage defect of three millimeters, which corresponded to a maximum patellofemoral impairment of 20 percent impairment at Table 17-31. In addition, the Office medical adviser neglected to rate an impairment for cartilage loss for the right knee, despite the fact that Dr. Rodriguez had calculated an impairment for the right knee for mild cartilage thinning, based on one millimeter of remaining cartilage in the knee, which translated to a seven percent impairment at Table 17-31.

When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[6] Accordingly, the Board will set aside the Office's June 26, 2006 decision and remand the case to the Office for referral to an impartial medical specialist to resolve the conflict in medical

[5] 20 C.F.R. § 10.404.

[6] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(i)f there is a 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

evidence regarding the degree of permanent impairment stemming from appellant's accepted left and right knee conditions. The Board notes that the actual December 8, 2005 MRI scan results are not contained in the instant record; they are merely referred to in the reports submitted by Dr. Rodriguez and the Office medical adviser. On remand, therefore, the Office is instructed to reconstruct the case file and include the December 8, 2005 MRI scan report in the instant record. The Board further notes that the Office medical adviser improperly neglected to make any findings regarding an impairment for cartilage loss in the right knee, notwithstanding the fact that Dr. Rodriguez rated a seven percent impairment for arthritis at Table 17-31, based on mild cartilage thinning of the right knee. The Board therefore instructs the Office to ask the impartial medical specialist to consider an additional impairment for the right lower extremity based on Dr. Rodriguez's findings of mild cartilage thinning in the right knee.

Accordingly, the Office's June 26, 2006 decision is set aside and the case remanded to the Office for referral to an impartial medical specialist to resolve the conflict in medical evidence regarding whether the degree of impairment appellant sustained in his lower extremities due to his accepted left and right knee conditions. After such development as it deems necessary, the Office shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision with regard to an impairment based on the left and right lower extremities and the case is remanded for further development. After such development as it deems necessary, the Office shall issue a *de novo* decision.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2006 decision is set aside and the case is remanded to the Office for further action consistent with this decision of the Board.

Issued: February 1, 2008
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