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

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| **A.M., Appellant** | ) | |
| | ) | **Docket No. 07-1721** |
| **and** | ) | **Issued: February 7, 2008** |
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| **U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On June 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 13, 2007 which denied her claim for an additional 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 two percent permanent impairment of the right leg for which she has received a schedule award and no impairment of the left leg.

### ***FACTUAL HISTORY***

On June 1, 1999 appellant, then a 45-year-old distribution clerk, filed an occupational disease claim alleging that she developed synovitis and bilateral knee derangement in the performance of duty. The Office accepted her claim for derangement of both knees and aggravation of osteoarthritis of both knees. It authorized arthroscopic surgery of the right knee

which was performed on September 11, 2003. Appellant stopped work on February 2, 1999 and returned on June 1, 1999. She stopped again on October 21, 2002.

Appellant came under the treatment of Dr. Samuel J. Chmell, a Board-certified orthopedic surgeon. In reports dated March 8 to May 3, 2003, she was treated for injuries to her knees caused by repetitive work activities. Dr. Chmell diagnosed bilateral knee derangement with traumatic aggravation of osteoarthritis right more than left and advised that appellant was totally disabled. In reports dated June 23 to July 21, 2003, he noted that a magnetic resonance imaging (MRI) scan of the right knee revealed a torn medial meniscus. Dr. Chmell diagnosed internal derangement and a medial meniscus of the right knee and a left knee strain. He recommended right knee arthroscopy. On September 11, 2003 Dr. Chmell performed arthroscopic surgery of the right knee with a partial medial meniscectomy, synovectomy patellafemoral and medial compartments and abrasion arthroplasty medial femoral condyle. He diagnosed torn medial meniscus of the right knee, synovitis of the right knee and chondromalacia medial femoral condyle of the right knee. In reports dated February 2 to April 12, 2004, Dr. Chmell noted that appellant was progressing slowly due to effusion of both knees with right ankle swelling. He diagnosed status post arthroscopy for the right knee torn medial meniscus with partial meniscectomy and consequential right ankle and foot derangements and advised that appellant was totally disabled. An MRI scan of the right knee dated June 27, 2003 revealed tear of the posterior horn of the medial meniscus.

On April 25, 2005 appellant filed a schedule award claim.[1] On April 6, 2006 Dr. Chmell opined that she had 61 percent permanent impairment of the right leg and 51 percent permanent impairment of the left leg in accordance with the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[2] He noted right knee flexion of 97 degrees for 10 percent impairment,[3] right knee extension of 7 degrees for 10 percent impairment,[4] with regard to weakness he found right knee flexion of Grade 4 for 12 percent impairment,[5] right knee extension of Grade 4 for 12 percent impairment,[6] antalgic limp with shortened stance for 7 percent impairment[7] and partial medial and lateral meniscectomies for 10

[1] In a July 29, 2005 correspondence, the Office acknowledged appellant's claim for a consequential right foot injury which she asserted was causally related to her accepted April 14, 1999 injury. It referred the matter to an Office medical adviser who in an April 20, 2005 report, opined that there was no objective evidence to support the diagnosis of right foot injury, right ankle tendinitis or right foot plantar fasciitis and determined that appellant did not sustain a consequential injury to the right ankle or foot. In a decision dated November 22, 2005, the Office denied appellant's claim for consequential right ankle and foot tendinitis and bilateral plantar fasciitis/heel spur syndrome. On December 15, 2005 appellant requested a review of the written record and in a decision dated April 10, 2006, the hearing representative affirmed the Office decision dated November 22, 2005.

[2] A.M.A., *Guides* (4th ed. 1993).

[3] *Id*. at 78, Table 41.

[4] *Id.*

[5] *Id*. at 77, Table 39.

[6] *Id.*

[7] *Id*. at 76, Table 36.

percent impairment,[8] for a total impairment of the right leg of 61 percent. With regard to the left knee, he noted 95 degrees of flexion for 10 percent impairment,[9] 5 degrees of extension for 10 percent impairment,[10] with regard to weakness Dr. Chmell found left knee flexion of Grade 4 for 12 percent impairment,[11] left knee extension of Grade 4 for 12 percent impairment[12] and antalgic limp with shortened stance for 7 percent impairment,[13] for a total impairment of the left leg of 51 percent. He determined that appellant reached maximum medical improvement on January 10, 2005.

The Office referred the medical evidence to an Office medical adviser. In a May 20, 2006 report,[14] the medical adviser opined that, in accordance with the A.M.A., *Guides*[15] appellant had two percent permanent impairment of the right lower extremity and no impairment of the left lower extremity. He noted that appellant underwent a partial medial meniscectomy for two percent impairment rating of the right knee.[16] However, there was no objective evidence to support any left leg impairment. The medical adviser noted that maximum medical improvement was March 11, 2004.

In a decision dated June 15, 2006, the Office granted appellant a schedule award for two percent permanent impairment of the right leg. It denied a schedule award for the left leg. The period of the award was from March 11 to April 20, 2004. In an amended decision dated July 3, 2006, the Office noted that a review of the record showed that appellant was in receipt of temporary total disability benefits during this period and, under the Act, an employee cannot receive payments for temporary total disability and for permanent partial impairment concurrently.

In a letter dated June 30, 2006, appellant requested an oral hearing.

In a decision dated October 26, 2006, an Office hearing representative set aside the July 3, 2006 decision and remanded the case for further medical development. He determined that there was a conflict of opinion between Dr. Chmell and the Office medical adviser as to the extent of permanent partial impairment of the lower extremities.

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[8] *Id*. at 85, Table 64.

[9] *Id*. at 78, Table 41.

[10] *Id.*

[11] *Id*. at 77, Table 39.

[12] *Id.*

[13] *Id*. at 76, Table 36.

[14] The report from the Office medical adviser reflected an incorrect date of December 6, 2004; however, this appears to be a typographical error.

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

[16] *Id*. at 546, Table 17-33.

To resolve the conflict the Office referred appellant to Dr. Jaroslaw B. Dzwinyk, a Board-certified orthopedic surgeon, selected as the impartial medical specialist. In a February 1, 2007 report, Dr. Dzwinyk noted examining appellant and reviewing her medical records. He noted a history of her work-related injury. Dr. Dzwinyk diagnosed medial meniscal tear of the right knee and temporary aggravation of early osteoarthritis of both knees. He noted findings upon physical examination of normal gait, no effusion in either knee, range of motion of both knees was symmetric and painless at 0 to 130 degrees, leg alignment was normal, no peripatellar findings in both knees, both knees were stable to ligamentous testing in all planes, joint lines were nontender and McMurray tests were negative bilaterally. Dr. Dzwinyk noted that the temporary aggravation would have ceased approximately six months after the arthroscopic surgery in March 2004. He found that, based on the most recent x-ray findings and current physical examination, there was no objective evidence of disability and appellant's symptoms were markedly out of proportion to the objective findings. Dr. Dzwinyk opined that appellant's work-related condition resolved in March 2004 and that she was capable of performing her duties as a distribution clerk without restriction. He noted that in accordance with the A.M.A., *Guides* she sustained a two percent impairment of the right leg.[17] He found that there was no functional impairment of the left leg.

Appellant submitted reports from Dr. Chmell dated November 16 to February 8, 2007. He noted a limp on the right side, crepitus in the right knee and swelling of the right ankle and foot. Dr. Chmell diagnosed multiple tendinitis, cervical spondylosis and right knee, ankle and hind foot derangement. Dr. Dzwinyk returned appellant to work subject to restrictions on January 11, 2007.

In a March 13, 2007 decision the Office denied appellant's claim for an additional schedule award for the lower extremities. It found that the weight of the medical evidence rested with Dr. Dzwinyk, the referee physician, who determined that appellant sustained no more than two percent permanent impairment of the right leg and no impairment of her left leg.[18]

## ***LEGAL PRECEDENT***

The schedule award provisions of the Act[19] and its implementing regulations[20] 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

[17] *Id.* at 546, Table 17-33.

[18] On May 31, 2007 the Office advised appellant that it proposed to terminate all compensation benefits. This matter is not before the Board on the present appeal as the Office had not issued a final termination decision prior to the filing of the instant appeal on June 14, 2007. *See* 20 C.F.R. § 501.2(c).

[19] 5 U.S.C. § 8107.

[20] 20 C.F.R. § 10.404 (1999).

all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[21]

## ***ANALYSIS***

On appeal, appellant contends that she has permanent impairment of both lower extremities. The Office accepted her claim for derangement of the knees and aggravation of osteoarthritis of both knees. It authorized arthroscopic surgery of the right knee which was performed on September 11, 2003. The Office found that a conflict existed in the medical evidence between appellant's attending physician, Dr. Chmell, who disagreed with the Office medical adviser concerning the extent of permanent impairment to her lower extremities. The Office referred appellant to Dr. Dzwinyk to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[22]

The Board finds that the opinion of Dr. Dzwinyk is sufficiently well rationalized and based upon a proper factual background. It is entitled to special weight and establishes that appellant sustained no more than a two percent impairment of the right lower extremity.

Dr. Dzwinyk reviewed appellant's history, reported findings and noted an essentially normal physical examination. He diagnosed medial meniscal tear of the right knee and temporary aggravation of early osteoarthritis of both knees. Dr. Dzwinyk opined that appellant would have recovered from her work-related condition by March 2004. He noted that on examination she had normal gait, no effusion in either knee, symmetric and painless range of motion of both knees at 0 to 130 degrees,[23] normal leg alignment, no peripatellar findings in both knees, stable to ligamentous testing in all planes of both knees, nontender joint lines and negative McMurray tests bilaterally. He indicated that, based on the most recent x-ray findings and current physical examination there was no objective evidence of disability and appellant's symptoms are markedly out of proportion to the objective findings. Dr. Dzwinyk opined that in accordance with the A.M.A., *Guides* appellant sustained two percent impairment of the right leg[24] and noted that there was no functional impairment of the left leg. He found no other basis on which to rate appellant's impairment. Dr. Dzwinyk concluded that there was no objective evidence to support an increase in impairment greater than the two percent impairment previously granted for the right leg.

The Board finds that Dr. Dzwinyk properly determined that there was no basis under the A.M.A., *Guides* for an award greater than the two percent impairment previously granted. This

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

[22] *Aubrey Belnavis*, 37 ECAB 206 (1985). *See* 5 U.S.C. § 8123(a).

[23] A.M.A., *Guides* 537, Table 17-10.

[24] *Id*. at 546, Table 17-33.

evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than two percent impairment of the right lower extremity.

Appellant submitted reports from Dr. Chmell dated November 16, 2006 to February 8, 2007, who noted a limp on the right side, crepitus in the right knee and swelling of the right ankle and foot. Dr. Chmell diagnosed multiple tendinitis, cervical spondylosis and right knee, ankle and hind foot derangement. The Board has reviewed his reports and notes that he failed to provide objective evidence to support an increase in impairment greater than the two percent impairment previously granted. Moreover, Dr. Chmell's reports are similar to his prior reports and are insufficient to overcome that of Dr. Dzwinyk or to create a new medical conflict.[25]

## ***CONCLUSION***

The Board finds that appellant has no ratable impairment for her left leg and has no more than two percent impairment of her right leg.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2008
Washington, DC

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

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

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

[25] *See Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Chmell's reports do not contain new findings or rationale upon which a new conflict might be based.