United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 09-973**
	)	**Issued: December 16, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Tom's River, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 3, 2009 appellant filed a timely appeal from a December 8, 2008 decision of the Office of Workers' Compensation Programs affirming a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has more than seven percent impairment of his left lower extremity, for which he received a schedule award.

FACTUAL HISTORY

On February 5, 2003 appellant, then a 52-year-old carrier technician, injured his left knee on a van door. The Office accepted the claim for left knee contusion and medial meniscus tear and aggravation of chondromalacia of the patella. Appellant underwent an authorized arthroscopy of the left knee on August 21, 2003. The Office paid wage loss and appellant returned to full-time duty in October 2003. On August 8, 2004 appellant filed a schedule award claim.

In an April 27, 2004 report, Dr. David Weiss, an osteopath specializing in orthopedic medicine, found 34 percent left lower extremity impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). This was comprised of 17 percent strength deficit left quadriceps (knee extension), 17 percent motor strength deficit left gastrocnemius (ankle plantar-flexion) and 3 percent pain-related impairment.

In an August 18, 2005 report, an Office medical adviser reviewed the medical evidence of record. Based on Dr. Weiss' April 27, 2004 report, he opined that appellant had 24 percent left lower extremity impairment. This was comprised of 17 percent decreased quadriceps strength, 5 percent chondromalacia patellae with crepitus on motion and 3 percent pain-related impairment. The Office medical adviser opined that Dr. Weiss' rating for ankle plantar-flexion was not related to appellant's knee problem.

The Office determined that a conflict in medical opinion existed between Dr. Weiss and the Office medical adviser regarding the extent of appellant's impairment. It referred appellant to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Glenn was provided with a statement of accepted facts, the medical record and a list of questions.

In a January 17, 2006 report, Dr. Glenn noted the history of injury, reviewed the medical records and presented findings on examination. He agreed with Dr. Weiss' determination that appellant reached maximum medical improvement on April 27, 2004. Dr. Glenn noted that he did not obtain the same history that Dr. Weiss reported with respect to appellant complaints of daily and constant left knee pain with instability and swelling and could not substantiate his description of any alteration to appellant's activities of daily living or level of pain. He was not able to demonstrate any impairment in muscle strength, noting that appellant demonstrated normal strength in the quadriceps group, the hamstring muscle group and the gastrocsoleus muscle group. Dr. Glenn also could not detect any difference in the circumferential measurements of the gastrocnemius. He agreed with the Office medical adviser that the reported gastrocnemius weakness and ankle involvement had nothing to do with the accepted knee condition. Dr. Glenn analyzed appellant's impairment under the three methods provided under the A.M.A., *Guides* and found the diagnosed-based method yielded the greater impairment.[1] He found that appellant had seven percent permanent impairment of the left lower extremity. Under Table 17-33, page 546 of the A.M.A., *Guides*, Dr. Glenn attributed one percent whole person impairment for partial medial meniscectomy. Under footnote Table 17-31 page 544, five percent lower extremity impairment for aggravation of the preexisting patellofemoral arthritis was attributed as appellant had a history of direct trauma, a complaint of patellofemoral pain and crepitation on physical examination, but there was no evidence of joint space narrowing on x-ray. He also attributed one percent lower extremity impairment for pain as appellant advised pain was only a factor at the end of the day.

[1] Under the functional based method, Dr. Glenn found that appellant's range of motion was normal as there was no evidence of loss of flexion, flexion contracture and/or varus or valgus deformity. Under the anatomic method, he opined that the atrophy of the knee was clinically insignificant and the patellofemoral medial compartment arthritis would yield five percent lower extremity impairment.

On May 4, 2006 an Office medical adviser reviewed Dr. Glenn's report and concurred with his calculation of appellant's permanent partial impairment.

By decision dated May 22, 2006, the Office granted appellant a schedule award for seven percent impairment to the left lower extremity. The award covered the period April 27 to September 15, 2004. Appellant disagreed with the decision and requested an oral hearing, which was held October 17, 2006. He testified at the hearing. No additional evidence was submitted.

By decision dated December 8, 2008, an Office hearing representative affirmed the May 22, 2006 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set 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 of loss of use.[4] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[5]

Section 8123(a) provides that, 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.[6] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[7]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

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[2] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C § 8107(c).

[3] 20 C.F.R. § 10.404.

[4] 5 U.S.C. § 8107(c)(19).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8123(a).

[7] 20 C.F.R. § 10.321.

[8] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS

The Office found a conflict in medical opinion between Dr. Weiss, appellant's treating physician, and the Office medical adviser with regard to the extent of permanent impairment to his left lower extremity. It properly referred appellant to Dr. Glenn for an impartial medical examination.[9]

In a January 17, 2006 report, Dr. Glenn reviewed appellant's history of injury, his medical treatment and performed a physical examination. He addressed the differences between the medical history and examination findings he obtained as compared to that of Dr. Weiss. Dr. Glenn agreed with the Office medical adviser that the reported gastrocnemius muscle weakness and ankle involvement were not do to the accepted knee condition. He evaluated appellant's impairment according to the three methods provided under the A.M.A., *Guides* and found the diagnosed-based method yielded the greater impairment of the left lower extremity or 7 percent.[10] Under Table 17-33 page 546 of the A.M.A., *Guides,* Dr. Glenn allowed one percent impairment of the whole person rather than two percent lower extremity impairment for the partial medial meniscectomy. Under Table 17-31 page 544, he attributed five percent lower extremity impairment for aggravation of the preexisting patellofemoral arthritis as appellant had a history of direct trauma, a complaint of patellofemoral pain and crepitation on physical examination, but no evidence of joint space narrowing on x-ray. Dr. Glenn also allowed one percent impairment for pain. He found that appellant had total seven percent left lower extremity impairment.

Dr. Glenn used a diagnostic-based estimate for determining appellant's impairment rating and explained why he included impairment for pain. He properly utilized the A.M.A., *Guides* in determining the impairments of the left lower extremity. Dr. Glenn's report is based on a proper history of injury and is appropriately detailed to constitute the special weight of the medical opinion evidence. He provided his findings on physical examination and properly applied the appropriate sections of the A.M.A., *Guides* in reaching his impairment rating. Dr. Glenn explained that the diagnosed-based estimate method was most favorable to appellant and explained how he calculated the impairment rating. This report resolves the existing conflict of medical opinion evidence. Appellant has eight percent impairment of the left lower extremity based on two percent for the partial medial meniscectomy,[11] five percent for aggravation of preexisting patellofemoral arthritis and one percent for pain. As he received a schedule award for seven percent impairment of his left lower extremity, he is entitled to an additional one percent impairment.

The Board notes that contrary to appellant's argument on appeal, Dr. Glenn based his impairment rating on his findings on physical examination and described all impairments of the

[9] *See Talmadge Miller*, 47 ECAB 673 (1996).

[10] Dr. Glenn advised there was no impairment under the functional-based method and five percent impairment due to patellofemoral medial compartment arthritis under the anatomic method.

[11] The Board notes that Dr. Glenn used the one percent whole person impairment in his calculation. However, whole person impairment is not permitted under the Act. *B.P.*, 60 ECAB ___ (Docket No. 08-1457, issued February 2, 2009).

left lower extremity, including appellant's preexisting chondromalacia. This was considered in apportioning five percent impairment under Table 17-31. Dr. Glenn also explained how the impairment rating was comprised.

CONCLUSION

The Board finds that appellant has eight percent impairment of the left lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 8, 2008 is affirmed as modified.

Issued: December 16, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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