

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

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G.D., Appellant )  
and ) Docket No. 09-508  
U.S. POSTAL SERVICE, POST OFFICE, ) Issued: September 14, 2009  
Wilmington, DE, Employer )  
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*Appearances:*

*Jeffrey P. Zeelander, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 12, 2008 appellant filed a timely appeal from the December 3, 2008 decision of the Office of Workers' Compensation Programs granting a 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 left lower extremity.

**FACTUAL HISTORY**

On July 29, 1991 appellant, then a 32-year-old mechanic, sustained injury after kneeling on the floor performing his work duties. He attempted to stand up and experienced a sharp pain in his left knee. Appellant did not stop work. The Office accepted sprain of the left knee and medial collateral ligament and a popliteal synovial cyst.

On August 9, 1991 appellant underwent a magnetic resonance imaging (MRI) scan of the left knee which revealed a small Grade 3 meniscal tear involving the posterior horn of the medial and anterior horn of the lateral menisci. In a January 16, 1992 attending physician's report,

Dr. David N. Bosacco, a Board-certified orthopedic surgeon, diagnosed a left medial meniscus tear. Appellant underwent arthroscopic surgery with medial meniscectomy on September 10, 1991. Dr. Bosacco noted that appellant was totally disabled from September 10 to 30, 1991. Appellant was later treated by Dr. Leo W. Raisis, a Board-certified orthopedic surgeon, who diagnosed status post left knee arthroscopy and partial medial meniscectomy secondary to a work injury in 1991, secondary degenerative changes, secondary Baker's cyst and left leg radiculopathy, possibly related to a military injury. On March 2, 2001 Dr. Raisis noted appellant's complaint of significant left knee pain with inflammation. He noted a full range of motion with a normal neurological examination and diagnosed left knee postarthroscopy, partial medial meniscectomy secondary to work injury in 1991, secondary degenerative changes and secondary Baker's cyst.

On March 5, 2008 Dr. Raisis evaluated appellant for left knee pain and indicated that arthroscopic photos showed evidence of a partial medial meniscectomy, Grade 2 changes of the medial tibial plateau articular surface. On examination of the left knee, he found tenderness at the popliteal space and medial joint line, mildly positive McMurray's test, negative anterior and posterior Drawer test, no collateral ligament instability and no deficit with regard to motor, sensory or reflex function. Dr. Raisis diagnosed left knee early osteoarthritis post-traumatic from the original 1991 work injury. He examined appellant on April 2, 2008 and reported little change in his condition. Dr. Raisis attributed his left leg pain to a back injury sustained in 1983 while in the military. He diagnosed left knee injury sustained at work in 1991, secondary degenerative arthritis and left leg radiculopathy and possible back injury.

On October 13, 2008 appellant filed a claim for a schedule award. In a report dated July 14, 2008, Dr. David Weiss, an osteopath, noted that appellant reached maximum medical improvement on that date. He diagnosed post-traumatic internal derangement with medial meniscus and lateral meniscus tears to the left knee by MRI scan, status post arthroscopic surgery with partial medial meniscectomy of the left knee and a popliteal cyst. Based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)<sup>1</sup> he advised that appellant had 15 percent impairment of the left lower extremity. Dr. Weiss noted that range of motion for the left knee was 120 degrees, patellofemoral compression produced crepitus with no pain, there was tenderness over the lateral joint line, manual muscle strength testing of the gastrocnemius musculature was normal on the left, quadriceps strength was a Grade 4, gastrocnemius circumference measure 38 centimeters on the right and 38.5 centimeters on the left and quadriceps circumference measured 46 centimeters on the right and 45.5 centimeters on the left. He noted that appellant complained of daily left knee pain and stiffness that waxed and waned and swelling and instability of the left knee. Dr. Weiss noted that in accordance with the A.M.A., *Guides* appellant had 12 percent impairment for Grade 4 motor strength deficit of the left quadriceps muscle (left knee extension);<sup>2</sup> and 3 percent for pain-related impairment.

In a letter dated October 22, 2008, the Office notified appellant that it was reconstructing his claim file. It requested copies of medical and diagnostic evidence referenced by Dr. Weiss to

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<sup>1</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

<sup>2</sup> *Id.* at 532, Table 17-8.

be used in preparing a statement of accepted facts for the Office medical adviser in reviewing the impairment evaluation.

Appellant submitted an operative report from Dr. Bosacco dated September 10, 1991, in which he performed arthroscopic medial meniscectomy of the left knee and diagnosed torn medical meniscus of the left knee. In treatment notes dated September 17 to October 8, 1991, Dr. Bosacco diagnosed torn medial meniscus of the left knee and released appellant to work on September 30, 1991 subject to restrictions. On November 1, 2001 Dr. Vaneeta Kabal, a Board-certified orthopedic surgeon, diagnosed mild strain left knee and Baker's cyst on the left popliteal fossa and returned appellant to work full time.

On January 23, 2008 an Office medical adviser found that appellant had two percent impairment of the left lower extremity. He noted Dr. Weiss rated appellant for motor deficit and pain-related impairment. However, the Office medical adviser indicated that manual muscle testing depended on the examinee's cooperation and should be concordant with other observable pathological signs and medical evidence. He further noted that appellant's condition did not fit the criteria for pain-related impairment. The Office medical adviser opined that appellant's impairment was best rated under Table 17-33 of the A.M.A., *Guides* which provided two percent impairment for the left knee partial medial meniscectomy.<sup>3</sup> He noted that appellant reached maximum medical improvement on July 14, 2008.

In a decision dated December 3, 2008, the Office granted appellant a schedule award for two percent permanent impairment of the left lower extremity. The period of the schedule award was from July 14 to August 23, 2008.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulations<sup>5</sup> 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 regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

### **ANALYSIS**

On appeal, appellant contends that he has more than two percent permanent impairment of the left lower extremity. He asserts that there is a conflict in opinion between the medical

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<sup>3</sup> *Id.* at 546, Table 17-33.

<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404 (1999).

<sup>6</sup> See *id.*; R.D., 59 ECAB \_\_\_\_ (Docket No. 07-379, issued October 2, 2007).

adviser and Dr. Weiss with regard to the manner by which impairment of his leg is rated. The Office accepted appellant's claim for sprain of the left knee and medial collateral ligament and popliteal synovial cyst and arthroscopic surgery was performed on September 10, 1991. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Weiss, appellant's treating physician.

The Office medical adviser used the diagnosed-based impairment estimate under Table 17-33 of the A.M.A., *Guides* to rate two percent impairment of the left lower extremity. This was based on the left knee partial medial meniscectomy.<sup>7</sup> Dr. Weiss rated impairment based on muscle weakness under Table 17-8 of the A.M.A., *Guides*. He found 15 percent impairment. Dr. Weiss determined that manual muscle strength testing resulted in Grade 4 impairment for the left knee, noting appellant's complaints of left knee pain and stiffness daily with episodes of instability. This is 12 percent impairment for Grade 4 motor strength deficit of the left quadriceps muscle (left knee extension).<sup>8</sup> Dr. Weiss also rated three percent for pain-related impairment.<sup>9</sup>

Section 8123(a) of the Act provides in pertinent part: "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."<sup>10</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.<sup>11</sup> The Board will remand the case for the Office to refer appellant to an impartial medical specialist to resolve the medical conflict regarding the method by which impairment arising from appellants accepted employment injury should be rated.

After such further development as the Office deems necessary, an appropriate decision should be issued regarding the extent of appellant's left lower extremity impairment.

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<sup>7</sup> A.M.A., *Guides*, 546, Table 17-33.

<sup>8</sup> *Id.* at 532, Table 17-8.

<sup>9</sup> The Board notes that Dr. Weiss erroneously attributed pain-related impairment under Chapter 18 of the A.M.A., *Guides*. See *id.* The Board has held that physicians should not use Chapter 18 to rate pain-related impairments for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*. See *Frantz Ghassan*, 57 ECAB 349 (2006); *Linda Beale*, 57 ECAB 429 (2006).

<sup>10</sup> 5 U.S.C. § 8123(a).

<sup>11</sup> *William C. Bush*, 40 ECAB 1064 (1989).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 3, 2008 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded for further action consistent with this decision.

Issued: September 14, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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