United States Department of Labor
Employees' Compensation Appeals Board

E.B., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Newark, NJ, Employer	)	**Docket No. 09-1321** **Issued: April 1, 2010**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 16, 2008 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit schedule award decisions dated November 29, 2007 and May 27, 2008. Pursuant to 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 has more than a five percent impairment of each lower extremity, for which he received a schedule award.

On appeal, appellant's attorney contended that appellant has more than a five percent impairment of each lower extremity. Counsel argued that the medical opinion of Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, is not entitled to the special weight accorded an impartial medical specialist as he failed to conduct a thorough physical examination and to reference any tables and figures in the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (5th ed. 2001) in determining appellant's

impairment. He further argued that an Office medical adviser cannot substitute his opinion for that of an impartial medical specialist regarding the A.M.A., *Guides* impairment rating.

FACTUAL HISTORY

On May 17, 2004 appellant, then a 54-year-old border protection officer, filed a traumatic injury claim assigned OWCP File No. xxxxxx966 alleging that on May 13, 2004 he sustained a torn cartilage in his right knee as a result of kneeling on it during firearms qualification.[1] By letter dated July 8, 2004, the Office accepted his claim for right knee meniscus tear. On July 12, 2004 appellant underwent a right knee arthroscopic partial medial meniscectomy with removal of loose bodies. On April 26, 2005 Dr. George T. Stollsteimer, an attending Board-certified orthopedic surgeon, released appellant to full-duty work on May 12, 2005.

On March 10, 2006 appellant filed a claim for a schedule award. In a November 3, 2005 medical report, Dr. Nicholas Diamond, an attending Board-certified pain management specialist, reviewed a history of appellant's March 31 and May 13, 2004 employment injuries and July 8 and August 30, 2004 knee surgeries. Appellant complained about constant pain and stiffness in both knees while performing his work duties and daily activities. He reported pain in his right knee as 5 to 8 out of 10 and in his left knee as 6 to 8 out of 10. Dr. Diamond provided his findings on physical examination which included Grade 4 out of 5 motor strength deficit of the right and left quadriceps and Grade 4 out of 5 motor strength deficit of the right and left gastrocnemius. He diagnosed right knee internal derangement (medial meniscus tear with loose body) and repetitive use left knee internal derangement (partial medial meniscus tear, synovitis, chondromalacia patella). Appellant was status post arthroscopic evaluation with partial synovectomy, partial medial meniscectomy, chondroplasty and debridement of the left knee and status post right knee arthroscopy and partial medial meniscectomy and arthroplasty with removal of loose body. Utilizing the A.M.A., *Guides*, Dr. Diamond determined that Grade 4 out of 5 motor strength deficit of the right and left quadriceps constituted a 12 percent impairment of each lower extremity (A.M.A., *Guides* 532, Table 17-8). He further determined that Grade 4 out of 5 motor strength deficit of the right and left gastrocnemius constituted a 17 percent impairment of each lower extremity (A.M.A., *Guides* 532, Table 17-8). Dr. Diamond combined the motor strength deficits for each lower extremity to calculate a 27 percent impairment (A.M.A., *Guides* 604, Combined Values Chart). He added 3 percent impairment for pain (A.M.A., *Guides* 574, Figure 18-1) in each knee, totaling a 30 percent impairment of each lower extremity.

On May 18, 2006 Dr. Arnold T. Berman, an Office medical adviser, reviewed the medical evidence, including Dr. Diamond's November 3, 2005 findings. He determined that appellant had a two percent impairment of the right lower extremity based on his partial medial meniscectomy (A.M.A., *Guides* 546, Table 17-33). Dr. Berman advised that he was not entitled to an additional impairment for pain based on his overall function. He determined that appellant

[1] Prior to the instant claim, appellant filed a claim assigned OWCP File No. xxxxxx271 for a left knee injury he sustained on March 31, 2004 as a result of running. The Office accepted his claim for left knee derangement. On August 30, 2004 appellant underwent a left knee arthroscopic partial meniscectomy with partial synovectomy, chondroplasty and debridement of the knee. The Office combined the claims assigned OWCP File Nos. xxxxxx271 and xxxxxx966 into a master claim assigned OWCP File No. xxxxxx966.

had a two percent impairment of the left lower extremity based on his partial medial menisectomy (A.M.A., *Guides* 546, Table 17-33) and an additional three percent impairment for pain (A.M.A., *Guides* 574, Table 18-1), totaling a five percent impairment. Dr. Berman stated that in determining that appellant had a 30 percent impairment of each lower extremity, Dr. Diamond failed to properly apply section 17.2e on page 531 of the A.M.A., *Guides* which addressed manual muscle strength testing and Table 17-8 on page 532 of the A.M.A., *Guides* which addressed impairment due to muscle weakness. Dr. Berman concluded that appellant reached maximum medical improvement on November 3, 2005.

By decision dated June 14, 2006, the Office granted appellant a schedule award for a two percent impairment of the right lower extremity and a five percent impairment of the left lower extremity. In a June 19, 2006 letter, his attorney requested an oral hearing before an Office hearing representative.

By decision dated August 23, 2006, an Office hearing representative set aside the June 14, 2006 decision and remanded the case to the Office. She found a conflict in the medical opinion evidence between Dr. Diamond and Dr. Berman regarding the extent of permanent impairment to appellant's lower extremities. On remand, the hearing representative instructed the Office to refer appellant to an appropriate impartial medical examiner to resolve the conflict.

By letter dated September 26, 2006, the Office referred appellant, together with a statement of accepted facts and the case record to Dr. William D. Emper, a Board-certified orthopedic surgeon, for an impartial medical examination. In a February 13, 2007 report, he advised that appellant had recovered 100 percent from his injuries and was capable of performing his work duties as an immigration customs officer with no restrictions.

By letter dated March 1, 2007, the Office requested that Dr. Emper submit a supplemental report providing whether appellant sustained any ratable permanent impairment based on the A.M.A., *Guides*. No report was submitted by Dr. Emper.

By letter dated August 2, 2007, the Office referred appellant, together with a statement of accepted facts and the case record to Dr. Richard J. Mandel, a Board-certified orthopedic surgeon specializing in hand surgery, for an impartial medical examination. In a September 24, 2007 report, he reviewed a history of appellant's March 31 and May 13, 2004 injuries and his July 2004 arthroscopic right knee surgery. Dr. Mandel noted his chief complaint of anterior right knee pain. Appellant experienced increased pain when attempting to run, descending stairs, squatting, kneeling, standing for more than 15 minutes in one position and walking more than 100 yards. He also experienced pain when sitting on a high stool with his legs dangling after a period of time and getting out of his car after a long drive. Appellant's knee hurt everyday, although he had no pain when lying supine. Dr. Mandel noted similar pain symptoms regarding the left knee. On physical examination, he listed his normal findings with appellant's complaints of tenderness on the right to palpation along the medial joint line and minimally over the lateral joint line and over the left patellar tendon and lateral joint line, and bilateral knee discomfort when standing up from a full squat. Dr. Mandel reported minimal crepitus on range of motion of the right knee and slightly greater crepitus on the left. He determined that appellant had a two percent impairment of the right knee based on the A.M.A., *Guides*. Dr. Mandel stated that his impairment rating differed from that of Dr. Diamond who attributed a significant impairment

based on muscle weakness about the right knee while he did not find any weakness in the knee or atrophy in either knee. He indicated that the musculature was well developed, including the velocity-modulated oscillator (VMO). Dr. Mandel stated that there was no radiographic evidence of arthrosis. He concluded that appellant could continue performing his regular work duties as a customs and border patrol officer.

In an October 12, 2007 letter, the Office requested that Dr. Mandel submit a supplemental report that provided an impairment rating for appellant's left knee based on the A.M.A., *Guides*. In an October 18, 2007 report, he advised that appellant had no impairment to his left knee. Dr. Mandel stated that x-rays of the left knee revealed no arthritic change or joint space narrowing. He further stated that his examination revealed no limp, atrophy, loss of motion, deformity or other such abnormality. Dr. Mandel stated that his only positive finding of mild crepitus could reflect some very early osteoarthritic change, but any such change was insufficient to be evident on radiographs.

On November 16, 2007 Dr. Morley Slutsky, an Office medical adviser Board-certified in preventive medicine, reviewed the medical evidence, including Dr. Mandel's findings. He opined that appellant had a five percent impairment of each lower extremity. Dr. Slutsky stated that he had no muscle weakness in either lower extremity. He determined that appellant had a two percent impairment of each lower extremity due to his partial medial meniscectomies (A.M.A., *Guides* 546, Table 17-33). Dr. Slutsky further determined that his excess pain as reported by Dr. Diamond and Dr. Mandel and resulting limitations in both knees represented an additional three percent impairment under Chapter 3.700 of the Office's procedure manual[2] and section 18.3a of the A.M.A. *Guides*,[3] totaling a five percent impairment of each lower extremity. He concluded that appellant reached maximum medical improvement on November 3, 2005.

By decision dated November 29, 2007, the Office granted appellant an amended schedule award for an additional three percent impairment of the right lower extremity, totaling five percent impairment. It found that he did not have more than five percent impairment of the left lower extremity. In a December 4, 2007 letter, appellant's attorney requested an oral hearing.

By decision dated May 27, 2008, a second Office hearing representative affirmed the November 29, 2007 decision. He found that Dr. Emper and Dr. Mandel had been improperly identified as impartial medical examiners as no true conflict existed between Dr. Diamond and Dr. Berman on the extent of appellant's permanent impairment. The hearing representative found that Dr. Diamond's impairment rating did not conform to the A.M.A., *Guides* while Dr. Berman's impairment rating conformed to the A.M.A., *Guides*. The hearing representative stated that Dr. Diamond did not explain why he used strength measurements to determine permanent impairment and offered no explanation as to how his test results are concordant with other observable pathologic signs and other evidence of record as per the A.M.A., *Guides.* Moreover, Dr. Berman explained why he applied Chapter 18, page 571, section 18.3b to award appellant an additional three percent for pain, whereas Dr. Diamond did not. Consequently, he determined that Dr. Emper and Dr. Mandel should be considered second opinion physicians.

[2] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 (October 1995).

[3] A.M.A., *Guides* 570.

The hearing representative concluded that appellant had no more than a five percent impairment of each lower extremity based on Dr. Slutsky's November 16, 2007 opinion.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulations[5] 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.[6] 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.[7]

In some instances, an Office medical adviser's opinion can constitute the weight of the medical evidence. This occurs in schedule award cases where an opinion on the percentage of permanent impairment and a description of physical findings is on file from an examining physician, but the percentage estimate by this physician is not based on the A.M.A. *Guides*. In this instance, a detailed opinion by the Office medical adviser which gives a percentage based on reported findings and the A.M.A., *Guides* may constitute the weight of the medical evidence.[8]

ANALYSIS

Appellant contends on appeal that he has more than a five percent impairment of each lower extremity. The Office accepted his claim for right knee meniscus tear and left knee derangement. Appellant underwent right and left knee arthroscopic partial medial meniscectomies to treat the accepted conditions. By decision dated November 29, 2007, the Office granted him a schedule award for a five percent impairment of each lower extremity. In a May 27, 2008 decision, it found that appellant was not entitled to any additional schedule award. The Board finds that appellant has not met his burden of proof to establish that he has impairment greater than that already awarded.

Dr. Mandel initially served as an impartial medical specialist and was subsequently found to be a second opinion physician as the second Office hearing representative determined that there was no conflict in the medical evidence regarding the extent of appellant's permanent impairment, found that appellant sustained a two percent impairment of the right lower extremity. The Board finds that this was a proper determination as no conflict in medical

[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[5] 20 C.F.R. § 10.404.

[6] 5 U.S.C. § 8107(c)(19).

[7] *Supra* note 5.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(h) (April 1993).

opinion evidence existed between Dr. Diamond, appellant's attending physician, and Dr. Berman, the Office medical adviser, as Dr. Diamond did not properly apply the A.M.A., *Guides* to determine the extent and degree of appellant's impairment rating. Unlike Dr. Berman, Dr. Diamond did not explain why he awarded an additional three percent impairment for pain-related impairment for the left knee,[9] in addition to the two percent for the partial medial meniscectomy.[10] Moreover, Dr. Diamond did not apply section 17.2e, page 531, regarding manual muscle testing or Table 17-8, page 532, regarding impairment due to lower extremity muscle weakness.[11] As these reports were not of equal weight, no conflict existed.[12]

In his September 24, 2007 report, Dr. Mandel reported his primary complaint of right and left knee pain when attempting to engage in various activities. He listed his normal findings on physical examination with appellant's complaints of tenderness on the right to palpation along the medial joint line and minimally over the lateral joint line and over the left patellar tendon and lateral joint line and bilateral knee discomfort when standing up from a full squat. Dr. Mandel found minimal crepitus on range of motion of the right knee and slightly greater crepitus on the left. Dr. Mandel stated that unlike Dr. Diamond who attributed a significant impairment based on muscle weakness about the right knee, he did not find any weakness in the knee or atrophy in either knee. He stated that the musculature was well developed, including the VMO. Dr. Mandel further stated that there was no radiographic evidence of arthrosis. While he noted appellant's partial medial meniscectomy and determined that appellant was entitled to a two percent impairment of the right lower extremity (A.M.A., *Guides* 546, Table 17-33), he did not consider other factors such as, appellant's right knee pain that potentially could affect appellant's overall impairment rating or explain why this factor was not applicable to appellant. As Dr. Mandel did not properly make an impairment rating for the right lower extremity utilizing

[9] Section 18.3b of the A.M.A., *Guides*, at 571 provides: "Examiners should not use this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment rating systems given in other chapters of the A.M.A., *Guides.*

[10] A.M.A., *Guides* 546, Table 17-33.

[11] Although Dr. Diamond opined that appellant had a 30 percent impairment of each lower extremity, he failed to properly apply the A.M.A., *Guides*. He determined that appellant had a 27 percent impairment of each lower extremity and added 3 percent impairment for bilateral knee pain to calculate a 30 percent impairment of each lower extremity (A.M.A., *Guides* 532, 574, Table 17-8, Figure 18-1). The Board notes that Dr. Diamond's 27 percent impairment rating is based on manual muscle testing resulting in lower extremity weakness. However, in section 17.2e, the A.M.A., *Guides* state that, for manual muscle testing to be valid, the results should be concordant with other observable pathologic signs and medical evidence. Further, it provides that, if measurements are made by one examiner, they should be consistent on different occasions. The A.M.A., *Guides* also state that candidates whose performance is inhibited by pain are not good candidates for manual muscle testing and that other evaluation methods should be considered. Dr. Diamond did not support his use of the manual muscle test results with other observable pathologic signs and medical evidence, nor did he establish that he had performed the tests with consistent results on different occasions. Moreover, he reported appellant's pain in his right knee as 5 to 8 out of 10 and in his left knee as 6 to 8 out of 10, which would inhibit his performance during the test. In accordance with the A.M.A., *Guides*, appellant's permanent impairment should be rated based on other evaluation methods. The Board finds that Dr. Diamond's report is insufficient to establish that appellant is entitled to an additional schedule award.

[12] In situation 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 upon a proper factual background, must be given special weight. *Rose V. Ford*, 55 ECAB 449 (2004).

the A.M.A., *Guides*, his opinion is of diminished probative value in determining the extent of appellant's permanent impairment.[13]

Similarly, Dr. Mandel's October 18, 2007 opinion that appellant had no impairment to his left knee is of diminished probative value. He stated that there was no radiographic evidence of arthritic change or joint space narrowing and his findings on physical examination were normal. Dr. Mandel related that his only positive finding of mild crepitus, could reflect some very early osteoarthritic change, but any such change was insufficient to be evident on radiographs. He did not address whether appellant sustained any permanent impairment due to his August 30, 2004 partial medial meniscectomy and subsequent pain of the left knee. As noted, Table 17-33 on page 546 of the A.M.A., *Guides* sets forth the criteria for the assessment of lower extremity impairment due to a partial medial meniscectomy. While it appears that Dr. Mandel utilized this table in determining that appellant sustained a two percent impairment of the right knee due to his July 2004 partial medial meniscectomy, he did not apply the table or explain why it was not applicable to appellant's left knee for which he underwent the same surgery in August 2004. Further, he did not address whether appellant sustained any additional impairment due to his left knee pain under Table 18-1 at page 574 of the A.M.A., *Guides*. The Board finds that Dr. Mandel's opinion is of diminished probative value in determining the extent of appellant's permanent impairment.[14]

The Board further finds that Dr. Slutsky, the Office medical adviser, properly utilized the findings of Dr. Diamond, an attending physician, and Dr. Mandel and correlated them to specific provisions in the A.M.A., *Guides* to determine that appellant had a five percent impairment of each lower extremity. On November 16, 2007 Dr. Slutsky advised that appellant had no muscle weakness in either lower extremity. He determined that appellant had a two percent impairment of each lower extremity for undergoing partial medial meniscectomies (A.M.A., *Guides* 546, Table 17-33). Dr. Slutsky further determined that his excess pain and resulting limitations in both knees represented an additional three percent impairment (A.M.A., *Guides* 570, section 18.3a), totaling a five percent impairment of each lower extremity.

Dr. Slutsky properly applied the A.M.A., *Guides* to Dr. Diamond's and Dr. Mandel's findings and reached an impairment rating of five percent impairment for each lower extremity. The Board finds that this evaluation conforms to the A.M.A., *Guides* and establishes that appellant has no more than a five percent impairment of each lower extremity.

CONCLUSION

The Board finds that appellant has failed to establish that he has more than a five percent impairment of each lower extremity, for which he received a schedule award.

[13] *See Paul R. Evans, Jr.*, 44 ECAB 646, 651 (1993).

[14] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 27, 2008 and November 29, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 1, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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