

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Princeton, NJ, Employer)

Docket No. 10-359
Issued: August 24, 2010

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2009 appellant filed an appeal of an August 14, 2009 decision of the Office of Workers' Compensation Programs regarding 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 15 percent impairment of the left lower extremity, for which he received a schedule award.

On appeal, counsel contends that the Office erred by according the weight of the medical evidence to Dr. John P. Nolan, Jr., a Board-certified orthopedic surgeon, as he did not discuss joint space narrowing in the knees or whether an additional impairment should be assessed for arthritis. Alternatively, he asserts that the Office did not rely on Dr. Nolan, instead allowing an Office medical adviser to resolve the conflict of medical opinion.

FACTUAL HISTORY

This case has previously been before the Board. By decision issued January 18, 2006,¹ the Board set aside a May 11, 2005 decision of the Office and remanded the case to obtain a supplemental report from Dr. Robert R. Bachman, a Board-certified orthopedic surgeon and impartial medical specialist. By order issued April 25, 2008,² the Board set aside a June 1, 2007 decision of the Office and remanded the case for appointment of a new impartial medical examiner to resolve the conflict between Dr. Bachman, for the government, and Dr. David Weiss, an attending osteopathic physician. The law and the facts of the case as set forth in the Board's prior decisions are incorporated by reference.

On September 17, 2008 the Office selected Dr. Nolan, a Board-certified orthopedic surgeon, as the impartial medical specialist. In a September 30, 2008 report, Dr. Nolan reviewed the medical record and statement of accepted facts. He found instability of the left knee, slight limping with toe walking and .5 centimeters left quadriceps atrophy. Dr. Nolan diagnosed "knee pain status post arthroscopic partial meniscectomy, knee pain status post osteochondral damage to the medial femoral condyle with possible creation or aggravation of intra-articular loose bodies, knee pain secondary to possible causation and/or aggravation of degenerative arthritis in the medial compartment of the left knee."

In an undated addendum, Dr. Nolan noted reviewing new weight bearing anterior-posterior (AP), lateral and nonweight-bearing tunnel and patellofemoral x-rays of both knees. He opined that the "films were identical, right vs. left" without any evidence of arthritis. Dr. Nolan explained that the .5 left quadriceps atrophy was not ratable as it was less than the .9 noted in Table 17-6, page 530 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*").³ X-rays did not show a ratable cartilage interval according to Table 17-31, page 544.⁴ As the loose bodies were arthroscopically removed by suction cannula of either 3.5 or 4.2 millimeters in diameter, they were less than the "AMA ACD9/CPT code criterion for one centimeters or greater." Dr. Nolan found that the partial meniscectomy equaled two percent lower extremity impairment according to Table 17-33, page 546.⁵ The roughened articular surfaces and small loose bodies noted by appellant's surgeon were "most equivalent" to the wear and tear of articular cartilage caused by a total meniscectomy. Dr. Nolan noted that, although the A.M.A., *Guides* did not specifically

¹ Docket No. 05-1995 (issued January 18, 2006).

² Docket No. 08-215 (issued April 25, 2008).

³ Table 17-6, page 530 of the fifth edition of the A.M.A., *Guides* is entitled "Impairment Due to Unilateral Leg Muscle Atrophy." According to Table 17-6, thigh atrophy of less than one centimeter is not ratable.

⁴ Table 17-31, page 544 of the fifth edition of the A.M.A., *Guides* is entitled "Arthritis Impairments Based on Roentgenographically Determined Cartilage Intervals."

⁵ Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides* is entitled "Impairments Estimates for Certain Lower Extremity Impairments." According to Table 17-33, a partial medial meniscectomy equals a two percent impairment of the lower extremity.

address such roughening with small loose bodies, “a reasonable substitution” would be a total medial meniscectomy, equaling a seven percent impairment of the left leg.”⁶

The Office referred Dr. Nolan’s report and the medical record to an Office medical adviser for review. In a November 1, 2008 report, the Office medical adviser found that appellant had reached maximum medical improvement as of Dr. Nolan’s September 30, 2008 examination. The medical adviser agreed with Dr. Nolan’s finding of a two percent left lower extremity impairment due to partial meniscectomy without atrophy or arthritis, according to Table 17-33, page 546. The medical adviser agreed with Dr. Nolan that there was no provision in the A.M.A., *Guides* for a partial medial meniscectomy to warrant seven percent lower extremity impairment.

By decision dated December 22, 2008, the Office found that appellant was not entitled to an additional schedule award as Dr. Nolan found 2 percent impairment of the left lower extremity, less than the 15 percent previously awarded.

In a January 12, 2009 letter, appellant, through counsel, requested a hearing before an Office hearing representative. At the May 29, 2009 hearing, counsel contended that Dr. Nolan did not provide cartilage interval measurements substantiating that there was no ratable arthritis impairment. He asserted that the Office allowed the medical adviser to resolve the conflict and not Dr. Nolan.

By decision dated and finalized August 14, 2009, an Office hearing representative affirmed the December 22, 2008 decision, finding that Dr. Nolan’s clinical findings were thorough and based on a complete, accurate history. He provided rationale supporting two percent lower extremity impairment and explained that the seven percent impairment was not supported by the A.M.A., *Guides*. The Office medical adviser concurred with Dr. Nolan.

LEGAL PRECEDENT

The schedule award provisions of the Federal Employees’ Compensation Act⁷ provide for compensation to employees sustaining impairment from loss or loss of use of specified members of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized 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 Office as a standard for evaluation of schedule losses and the Board has concurred in such adoption.⁸

⁶ According to Table 17-33, page 546 of the fifth edition of the A.M.A., *Guides*, a total medial meniscectomy equals seven percent impairment of the lower extremity.

⁷ 5 U.S.C. §§ 8101-8193.

⁸ *Bernard A. Babcock, Jr.*, 52 ECAB 143 (2000).

ANALYSIS

The Office accepted that appellant sustained a torn left medial meniscus requiring an arthroscopic partial medial meniscectomy. It awarded him a schedule award for a 15 percent impairment of the left leg, based on the report of Dr. Bachman, a Board-certified orthopedic surgeon and second opinion physician. Appellant then claimed an additional impairment, as Dr. Weiss, an attending osteopathic physician, found a 30 percent loss of use of the left leg. The Office found a conflict between Dr. Bachman and Dr. Weiss and selected Dr. Nolan, a Board-certified orthopedic surgeon, as the impartial medical specialist.

Dr. Nolan submitted a September 30, 2008 report based on the complete medical record and a statement of accepted facts. He noted detailed findings on clinical examination, including .5 centimeters left quadriceps atrophy. Dr. Nolan explained that atrophy of less than .9 cm was not ratable according to Table 17-6, page 530 of the "A.M.A., *Guides*." He obtained a reviewed weight-bearing and nonweight-bearing x-rays of both knees, showing no evidence of arthritis. Dr. Nolan therefore found no ratable cartilage interval according to Table 17-31, page 544. Also, the loose bodies were too small to be ratable and there was no provision in the A.M.A., *Guides* for roughened articular surfaces without arthritis. Therefore, Dr. Nolan assigned two percent lower extremity impairment for partial medial meniscectomy according to Table 33, page 546. He noted that, although the A.M.A., *Guides* did not provide for it, the articular surface roughening with loose bodies could be considered equivalent to that caused by a total medial meniscectomy, which would constitute seven percent lower extremity impairment.

An Office medical adviser reviewed Dr. Nolan's report and concurred with his methodology in calculating two percent rating. He agreed with Dr. Nolan that the A.M.A. *Guides* did not support seven percent lower extremity impairment. The Board finds that the impairment rating by Dr. Nolan constitutes the special weight of medical opinion as the impartial medical referee.

On appeal, counsel contends that the Office erred by according the weight of the medical evidence to Dr. Nolan, an impartial medical examiner, as he did not discuss joint space narrowing in the knees or whether an additional impairment should be assessed for arthritis. In the addendum to his September 30, 2008 report, Dr. Nolan reviewed new x-rays of appellant's knees and stated that they did not demonstrate any arthritis or ratable loss of cartilage interval. Therefore, he did note an absence of joint space narrowing and arthritis.

Counsel also asserts that the Office improperly relied on the Office medical adviser to resolve the conflict instead of Dr. Nolan. As stated, Dr. Nolan found two percent impairment according to the appropriate tables and grading schemes of the fifth edition of the A.M.A., *Guides* then in use. He noted an alternative analysis, but stated that it had no basis according to the A.M.A., *Guides*. The Office medical adviser concurred with Dr. Nolan's finding of two percent lower extremity impairment and with his methodology. The Office based its decision on the report of Dr. Nolan who applied the A.M.A., *Guides*.⁹

⁹ It is well established that the Office may rely on the opinion of its medical adviser to apply the A.M.A., *Guides* to the clinical findings reported by an examining physician. *J.Q.*, 59 ECAB ____ (Docket No. 06-2152, issued March 5, 2008); *Linda Beale*, 57 ECAB 429 (2006).

CONCLUSION

The Board finds that appellant has not established that he sustained more than 15 percent impairment of the left lower extremity, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 14, 2009 is affirmed.

Issued: August 24, 2010
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