United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
	)	**Docket No. 09-1447**
and	)	**Issued: February 23, 2010**
	)	
DEPARTMENT OF THE NAVY, COMMANDER NAVAL INSTALLATION, INACTIVE FACILITY, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, 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 May 20, 2009 appellant filed a timely appeal of a February 17, 2009 decision of the Office of Workers' Compensation Programs which affirmed 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 10 percent permanent impairment of the left leg for which he received a schedule award.

FACTUAL HISTORY

This is the second appeal before the Board. In a May 17, 2001 decision, the Board reversed a February 1, 1999 decision of the Office, finding that it erred in reducing appellant's

wage-loss compensation based on his capacity to earn wages as a telemarketer.[1] The Board found that the medical evidence was insufficient to establish that appellant had the capacity to perform the duties of the selected position. The facts and circumstances of the case are set forth in the Board's prior decision and incorporated herein by reference.[2]

On February 28, 2006 appellant filed a claim for a schedule award.[3] In an October 6, 2005 report, Dr. Nicholas Diamond, an osteopath, diagnosed post-traumatic synovitis to the left knee, suprapatellar plica and degenerative changes of lateral surface, status post arthroscopy and excision of plica of the left knee, chronic left knee tenosynovitis and post-traumatic osteoarthritis. He stated that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A. *Guides*) fifth edition,[4] appellant had 30 percent impairment of the left leg. The examination revealed well-healed portal arthroscopy scars, an effusion, medial, infra and suprapatellar tenderness, restricted range of motion with medial joint space tenderness, crepitus with patellofemoral compression and crepitus within the medial joint compartment. Dr. Diamond noted manual muscle strength testing of the gastrocnemius musculature and quadriceps was Grade 4 on the left side. He noted that appellant complained of left knee pain and stiffness daily that waxed and waned, with episodes of swelling and instability. Dr. Diamond found 12 percent impairment for Grade 4 motor strength deficit of the left quadriceps,[5] 17 percent impairment for Grade 4 motor strength deficit of the left gastrocnemius[6] and 3 percent for pain-related impairment.[7]

In a report dated November 7, 2007, an Office medical adviser determined that appellant had 10 percent impairment of the left leg.[8] He reviewed the October 6, 2005 report of Dr. Diamond and questioned rating impairment based on strength deficit. The medical adviser

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[1] Docket No. 00-162 (issued February 1, 1999). On July 26, 1990 appellant sustained a left knee injury that was accepted for left knee contusion and internal derangement. The Office authorized arthroscopic surgery of the left knee with excision of a plica infection which was performed on October 3, 1990.

[2] On September 10, 2002 the Office terminated compensation benefits finding that the weight of the medical evidence established that appellant had no continuing disability or residuals of the July 26, 1990 injury. On April 12, 2005 a hearing representative affirmed the September 10, 2002 decision. On December 5, 2006 the Office denied modification of the prior decision.

[3] There was medical evidence in the prior appeal which is relevant to the current claim before the Board. An August 1, 1990 magnetic resonance imaging (MRI) scan of the left knee revealed a small focal area of increased signal intensity in the medial meniscus which might represent degenerative change. A January 22, 1991 MRI scan of the left knee showed a small knee effusion with possible horizontal tear involving the posterior horn of the lateral meniscus. A September 19, 1991 MRI scan of the left knee revealed meniscal degenerative changes with a vertical tear peripherally in the posterior horn of the medial meniscus which might be healed and minimal chondromalacia within the patellofemoral joint.

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

[5] *Id.* at 532, Table 17-8.

[6] *Id.*

[7] *Id.* at 574, Figure 18-1.

[8] *Id.* at 546-547, Table 17-33.

noted that under section 16.8a, decreased strength cannot be rated in the presence of painful conditions. Therefore, Dr. Diamond's rating of impairment for pain and strength deficit was improper. The medical adviser recommended two percent impairment for the left knee partial medial meniscectomy,[9] five percent impairment for pain/crepitance of the patellofemoral due to arthritis[10] and three percent for pain-related impairment.[11] He advised that the patellofemoral crepitation was documented on examination and MRI scan. Under the Combined Values Chart,[12] appellant had 10 percent permanent impairment of the left leg and reached maximum medical improvement on October 6, 2005.

On March 31, 2008 the Office granted appellant a schedule award for 10 percent permanent impairment of the left lower extremity. The period of the award was from October 6, 2005 to April 25, 2006.

On April 3, 2008 appellant requested an oral hearing which was held on August 21, 2008.

In a decision dated February 17, 2009, the hearing representative affirmed the Office decision dated March 31, 2008.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[13] and its implementing regulations[14] 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 regulation as the appropriate standard for evaluating schedule losses.[15]

ANALYSIS

On appeal, appellant contends that he has more than 10 percent impairment of his left leg. The Office accepted his claim for left knee contusion and internal derangement. Arthroscopic surgery was performed on October 3, 1990. The Board finds that there is a conflict in medical opinion between the Office medical adviser and Dr. Diamond, appellant's treating physician.

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

[10] *Id.* at 544, Table 17-31.

[11] *Id.* at 574, Figure 18-1.

[12] *Id.* at 604.

[13] 5 U.S.C. § 8107.

[14] 20 C.F.R. § 10.404 (1999).

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

On November 7, 2007 the Office medical adviser advised that appellant sustained a 10 percent impairment of the left lower extremity. He noted that appellant had two percent impairment of the left knee due to a partial medial meniscectomy,[16] five percent impairment for pain/crepitance of the patellofemoral[17] and three percent for pain-related impairment.[18] The cross-usage chart at Table 17-2 allows combining a diagnoses-based estimate with arthritis. By contrast, Dr. Diamond in his report dated October 6, 2005 also applied the A.M.A., *Guides* and found that appellant had 30 percent impairment of the left leg. He 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,[19] 17 percent impairment for Grade 4 motor strength deficit of the left gastrocnemius[20] and 3 percent for pain-related impairment.[21] Dr. Diamond found that the July 26, 1990 injury was the cause of appellant's impairment based on loss of strength. He supported an increased impairment rating of the left lower extremity while the Office medical adviser opined that appellant sustained no more than a 10 percent permanent impairment of the left lower extremity.[22]

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."[23] 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.[24]

The case will be remanded to the Office for referral of appellant to an impartial medical specialist to determine appellant's left lower extremity impairment under the standards of the A.M.A., *Guides*. After such further development as the Office deems necessary, an appropriate decision should be issued on appellant's claim.

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

[17] *Id.* at 544, Table 17-31.

[18] *Id.* at 574, Figure 18-1.

[19] *Id.* at 532, Table 17-8.

[20] *Id.*

[21] *Id.* at 574, Figure 18-1.

[22] The Board notes that both physicians 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 Linda Beale*, 57 ECAB 429 (2006); *Frantz Ghassan*, 57 ECAB 349 (2006).

[23] 5 U.S.C. § 8123(a).

[24] *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 February 17, 2009 and March 31, 2008 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: February 23, 2010
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