United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 09-1464**
	)	**Issued: February 5, 2010**
U.S. POSTAL SERVICE, SHARED SERVICE CENTER, Pittsburgh, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 May 26, 2009 appellant filed a timely appeal from the April 22, 2009 decision of the Office of Workers' Compensation Programs concerning a schedule award. 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 10 percent permanent impairment of his left leg, for which he received a schedule award.

FACTUAL HISTORY

The Office accepted that on May 18, 2003 appellant, then a 52-year-old mail handler, sustained a medial meniscus tear of his left knee due to pushing a heavy mail container. On June 16, 2003 Dr. Stuart L. Gordon, an attending Board-certified orthopedic surgeon, performed left medial and lateral meniscectomies with partial synovectomy of the patellofemoral joint. The procedures were authorized by the Office. Appellant returned to his regular work on July 25, 2003.

On July 1, 2008 appellant filed a claim alleging that he was entitled to a schedule award due to his accepted employment injury. Despite a request from the Office for more medical evidence, appellant did not submit a medical report assessing his permanent impairment at this time. In an August 6, 2008 decision, the Office denied appellant's claim on the grounds that he did not submit sufficient medical evidence to show that he was entitled to schedule award compensation.

On February 12, 2009 Dr. Nicholas Diamond, an attending osteopath, indicated that examination of appellant's left knee revealed an effusion with peripatellar tenderness. There was medial joint space tenderness as well as lateral joint line and joint space tenderness noted. Patellofemoral compression produced pain but no crepitus. However, there was crepitus noted in the medial and lateral joint compartments. Dr. Diamond indicated that there was difficulty performing both kneeling and squatting, that valgus and varus stress testing produced pain and that range of motion of the left knee joint was painful and restricted on flexion and extension. Manual muscle strength testing revealed that the quadriceps was graded 4/5 on the left versus 5/5 on the right and that the gastrocnemius was graded 4/5 on the left versus 5/5 on the right. Dr. Diamond indicated that quadriceps circumferencial measurements taken at 10 centimeters above the patella revealed 44.5 centimeters on the right versus 42.5 centimeters on the left. The gastrocnemius circumferencial measurements reveal 40 centimeters on the right versus 37 centimeters on the left. Dr. Diamond indicated that the work-related injury was responsible for the impairments that he found.[1] He determined that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001), appellant had a 12 percent impairment due to 4/5 motor strength deficit in the left quadriceps upon knee flexion and a 17 percent impairment due to 4/5 motor strength deficit in the left gastrocnemius upon ankle plantar flexion.[2] Dr. Diamond also indicated that appellant was entitled to a three percent impairment rating for pain under Chapter 18.3 of the A.M.A., *Guides*. He used the Combined Values Chart to combine all his impairment ratings and concluded that the total impairment of appellant's left leg was 30 percent.

On April 12, 2009 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as an Office medical adviser, reviewed the assessment of Dr. Diamond and concluded that appellant only had a 10 percent permanent impairment of his left leg. He stated that, from a clinical standpoint, atrophy and weakness would be unexpected and inconsistent with a claimant who had been working on a full-time basis as a postal clerk for over five years since his June 2003 surgery. Dr. Berman stated that the arthritic condition of the left medial joint space preexisted the work injury according to diagnostic testing of record. He discussed manual muscle testing and the need for consistency of measurements and stated, "Therefore, based upon the clinical picture, it would not be consistent with [the] claimant's activity level that there should be motor weakness and atrophy." Dr. Berman noted that, based on Table 17-33 on page 546 of the A.M.A., *Guides*, appellant was entitled to a 10 percent impairment rating due to the partial medial and lateral meniscectomies he underwent in June 2003. He noted that appellant

[1] Dr. Diamond used the Combined Values Chart on page 604 of the A.M.A., *Guides* to conclude that the total impairment of appellant's left leg due to muscle weakness was 27 percent. His diagnoses included post-traumatic internal derangement, medial and lateral meniscus tears and traumatic chondromalacia patella of the left knee.

[2] Dr. Diamond referenced Table 17-8 on page 532 of the A.M.A., *Guides*.

did not have any crepitation in the left knee and therefore was not entitled to a five percent impairment rating for arthritis under the footnote of Table 17-31 on page 544. Dr. Berman indicated that Dr. Diamond's pain-related impairment of three percent was not appropriate under the present circumstances. He concluded that appellant only had a 10 percent permanent impairment of his left leg.

In an April 22, 2009 decision, the Office granted appellant a schedule award for a 10 percent permanent impairment of his left leg. The award ran for 28.80 weeks from February 12 to September 1, 2009. The Office indicated that it based its schedule award on the opinion of Dr. Berman. It noted that the opinion of Dr. Diamond was of limited probative value because he did not explain how he applied the A.M.A., *Guides*.

LEGAL PRECEDENT

The schedule award provision of the Act[3] and its implementing regulations[4] 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.[5] It is well established that proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[6]

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."[7] 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.[8]

ANALYSIS

The Office accepted that on May 18, 2003 appellant sustained a meniscus tear of his left knee. On April 22, 2009 it granted appellant a schedule award for a 10 percent permanent

[3] 5 U.S.C. § 8107.

[4] 20 C.F.R. § 10.404 (1999).

[5] *Id*.

[6] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

[7] 5 U.S.C. § 8123(a).

[8] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

impairment of his left leg. The Office indicated that it based its schedule award on the opinion of Dr. Berman, a Board-certified orthopedic surgeon serving as an Office medical adviser.

The Board finds that there is an outstanding conflict in the medical evidence between Dr. Berman and Dr. Diamond, an attending osteopath, regarding the extent of appellant's left leg impairment. Therefore, the case must be remanded to the Office for further development.

On February 12, 2009 Dr. Diamond indicated that appellant had difficulty performing both kneeling and squatting, that valgus and varus stress testing produced pain and that range of motion of the left knee joint was painful and restricted on flexion and extension. Manual muscle strength testing revealed that the quadriceps was graded 4/5 on the left versus 5/5 on the right and that the gastrocnemius was graded 4/5 on the left versus 5/5 on the right.[9]

Dr. Diamond determined that manual muscle testing showed that appellant had a 12 percent impairment due to 4/5 motor strength deficit in the left quadriceps upon knee flexion and a 17 percent impairment due to 4/5 motor strength deficit in the left gastrocnemius upon ankle plantar flexion.[10] He used the Combined Values Chart on page 604 of the A.M.A., *Guides* to conclude that the total impairment of appellant's left leg due to muscle weakness was 27 percent.[11]

In contrast, Dr. Berman concluded on April 12, 2009 that appellant only had a 10 percent permanent impairment of his left leg. While Dr. Diamond felt that appellant had a 27 percent impairment due to weakness of two left leg muscles, Dr. Berman determined that appellant did not have any impairment due to muscle weakness.[12] He stated that, from a clinical standpoint, weakness and atrophy would be unexpected and inconsistent with a claimant who had been working on a full-time basis as a postal clerk for over five years since his June 2003 surgery. Dr. Diamond found that appellant only had a 10 percent impairment due to the partial medial and lateral meniscectomies he underwent in June 2003.[13]

Consequently, the case must be referred to an impartial medical specialist to resolve the conflict in the medical opinion evidence between Dr. Berman and Dr. Diamond regarding the extent of appellant's left leg impairment. On remand the Office should refer appellant, along with the case file and the statement of accepted facts, to an appropriate specialist for an impartial

[9] Dr. Diamond indicated that quadriceps circumferencial measurements taken at 10 centimeters above the patella revealed 44.5 centimeters on the right versus 42.5 centimeters on the left. The gastrocnemius circumferencial measurements reveal 40 centimeters on the right versus 37 centimeters on the left.

[10] *See* A.M.A., *Guides* 532, Table 17-8.

[11] Dr. Diamond also indicated that appellant was entitled to a three percent impairment rating for pain under Chapter 18.3 of the A.M.A., *Guides*. The Board notes, however, that Dr. Diamond did not adequately explain how this rating was justified by the detailed requirements of that chapter. *See* A.M.A., *Guides* 569-81, Chapter 18.3.

[12] Dr. Berman indicated that appellant was not entitled to an impairment rating for arthritis. Dr. Diamond did not provide a rating for arthritis. Dr. Berman indicated that appellant did not have any left knee crepitation, but Dr. Diamond found crepitation in the medial and lateral joint compartments of the left knee.

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

medical evaluation and report including a rationalized opinion on this matter. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's entitlement to schedule awards compensation.

CONCLUSION

The Board finds that, due to a conflict in the medical evidence, the case is not in posture for decision regarding whether appellant has more than a 10 percent permanent impairment of his left leg, for which he received a schedule award. The case is remanded to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2009 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: February 5, 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