

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

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**M.S., Appellant**

**and**

**U.S. POSTAL SERVICE, CARRIER ANNEX,  
Yardville, NJ, Employer**

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**Docket No. 09-2262  
Issued: July 15, 2010**

*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 September 10, 2009 appellant, through counsel, filed a timely appeal from a June 22, 2009 schedule award decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether appellant has more than 10 percent permanent impairment of the left leg, for which she received a schedule award.

**FACTUAL HISTORY**

On March 20, 2004 appellant, then a 59-year-old clerk, injured her left knee that day when she fell in the facility parking lot.<sup>1</sup> The Office accepted the claim for bilateral hand contusion and left knee contusions and lateral/medial meniscus tear. It authorized left

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<sup>1</sup> The Office assigned claim file number xxxxxx717.

arthroscopic knee surgery, which was performed on June 30, 2004. The Office accepted her claim for a recurrence of disability beginning June 30, 2004.

On December 8, 2004 appellant filed an occupational disease claim alleging that in November 2004 she first realized that left shoulder and right wrist conditions were employment related. The Office accepted the claim for a rotator cuff tear and authorized surgery on April 25, 2006. It assigned claim file number xxxxxx824.

On January 25, 2005 appellant filed a traumatic injury claim alleging that on January 20, 2005 she injured her left knee when she tripped and fell.<sup>2</sup> The Office accepted the claim for left knee contusion and a February 27, 2005 recurrence claim for medical treatment only.<sup>3</sup>

On August 9, 2007 Dr. Zohar Stark, a second opinion Board-certified orthopedic surgeon, noted appellant's complaints regarding her left shoulder and knee. He reviewed the history of injury to the knee in 2004 and arthroscopic surgery. On examination Dr. Stark found healed arthroscopic scars. Physical examination findings of the left knee included no reduced quadriceps mass or strength, no effusion, preserved knee range of motion with some crepitation on motion and no tenderness. Dr. Stark also reported no valgus/varus instabilities and negative McMurray, Lachman and Alpus tests.

Appellant filed a schedule award claim.<sup>4</sup> In a May 17, 2007 report, Dr. Nicholas P. Diamond, an osteopath, diagnosed post-traumatic left knee lateral and medial meniscus tears. Dr. Diamond found that, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) fifth edition, appellant had 30 percent impairment of the left leg.<sup>5</sup> The examination revealed well-healed portal arthroscopy scars, crepitus within the lateral joint compartment, difficulty kneeling, firm endpoints on performance of valgus and varus stress tests and negative Drawer and Lachman signs. Dr. Diamond noted manual muscle strength testing of the gastrocnemius musculature and quadriceps was Grade 4+/5 on the left side. He combined 12 percent impairment for Grade 4/5 motor strength deficit of the left

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<sup>2</sup> Appellant retired from the employing establishment effective July 1, 2007.

<sup>3</sup> The Office assigned claim file number xxxxxx329. On May 16, 2008 it combined the files under file number xxxxxx824 as the master file.

<sup>4</sup> The record reveals that appellant filed schedule award claims under all three claims. The Office has not issued a final decision for any employment-related permanent impairment of her upper extremities. The Board lacks jurisdiction to address this issue on appeal. 20 C.F.R. § 501.2(c); *see E.L.*, 59 ECAB \_\_\_ (Docket No. 07-2421, issued March 10, 2008); *Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to the review of final decisions by the Office).

<sup>5</sup> Dr. Diamond also rated a 17 percent left upper extremity impairment and a 10 percent right upper extremity impairment.

quadriceps,<sup>6</sup> 17 percent impairment for Grade 4/5 motor strength deficit of the left gastrocnemius<sup>7</sup> and 3 percent for pain-related impairment.<sup>8</sup>

On April 28, 2008 Dr. Harry J. Magilato, an Office medical adviser, noted that there were marked differences in the physical findings reported by Dr. Stark and Dr. Diamond regarding appellant's left knee. He recommended referral to an impartial medical examiner to resolve the conflict on the extent of permanent impairment to the left leg.

On August 7, 2008 the Office referred appellant to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, to resolve the conflict on the degree of permanent impairment for her accepted conditions.

On August 19, 2008 Dr. Glenn reviewed the medical evidence, a statement of accepted facts provided findings on physical examination. He concluded that appellant had 10 percent permanent impairment of the left lower extremity. On physical examination, there was no tenderness over the medial or lateral joint line, tenderness on the lateral aspect of the knee with normal posterior and anterior drawer signs and McMurray and Lachman tests, normal hamstring and quadriceps strength and no evidence of any muscle atrophy and/or muscle fasciculation. Dr. Glenn stated that he was unable to substantiate Dr. Diamond's report of quadriceps or gastrocnemius loss of strength and found that the impairment should be rated under the Diagnosis Related Estimates, which he utilized. He noted that consideration was given to pain in his assessment. Using Table 17-33, page 546,<sup>9</sup> Dr. Glenn concluded that appellant had 10 percent permanent impairment of the left leg as a result of her partial medial and lateral meniscectomy. He found May 17, 2007 to be the date of maximum medical improvement.

On October 19, 2008 Dr. Andrew A. Merola, an Office medical adviser, reviewed Dr. Glenn's report and agreed with the impairment rating.

On December 22, 2008 the Office granted a schedule award for 10 percent permanent impairment of the left lower extremity. The period of the award was from May 17, 2007, the date of maximum medical improvement based on Dr. Diamond's report, to January 12, 2008. It noted that appellant's claims for a schedule award for her upper extremities would be issued separately.

On December 31, 2008 appellant's counsel requested an oral hearing before an Office hearing representative, which was held on May 19, 2009.

In a decision dated June 22, 2009, a hearing representative affirmed the December 22, 2008 decision.

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<sup>6</sup> A.M.A., *Guides*, 532, Table 17-8.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 574, Figure 18-1.

<sup>9</sup> Dr. Glenn noted page 526 instead of 546, which appears to be a typographical error.

## LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act<sup>10</sup> and its implementing regulations<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

Section 8123(a) of the Act<sup>14</sup> provides that, 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>15</sup> When 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 on a proper factual background, must be given special weight.<sup>16</sup>

## ANALYSIS

The Office accepted appellant's claim for bilateral hand contusion and left knee contusion, which was subsequently expanded to include left rear lateral/medial meniscus tear as a result of the March 20, 2004 employment injury. It authorized left arthroscopic knee surgery which occurred on June 30, 2004. The issue to be resolved is whether appellant is entitled to a greater than 10 percent impairment of her left lower extremity.

The Office found a conflict in medical opinion between Dr. Diamond, an examining physician, and Dr. Stark, a second opinion Board-certified orthopedic surgeon, with regard to her diagnosis and the degree of permanent impairment for her accepted conditions. It referred appellant to Dr. Glenn for an impartial medical examination.<sup>17</sup>

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<sup>10</sup> 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

<sup>11</sup> 20 C.F.R. § 10.404.

<sup>12</sup> 5 U.S.C. § 8107(c)(19).

<sup>13</sup> 20 C.F.R. § 10.404; *see I.F.*, 60 ECAB \_\_\_\_ (Docket No. 08-2321, issued May 21, 2009); *A.A.*, 59 ECAB \_\_\_\_ (Docket No. 08-951, issued September 22, 2008).

<sup>14</sup> 5 U.S.C. §§ 8101-8193.

<sup>15</sup> *Id.* at § 8123(a); *see J.J.*, 60 ECAB \_\_\_\_ (Docket No. 09-27, issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>16</sup> *B.P.*, 60 ECAB \_\_\_\_ (Docket No. 08-1457, issued February 2, 2009); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>17</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006).

In an August 19, 2008 report, Dr. Glenn reviewed appellant's history of injury, her medical treatment and performed a physical examination. He addressed the differences between the examination findings he obtained as compared to those reported by Dr. Diamond. Dr. Glenn agreed with Dr. Stark that there was no gastrocnemius muscle weakness. He found the diagnosed-based method was the most appropriate measure of appellant's left lower extremity impairment. Under Table 17-33, page 546, of the A.M.A., *Guides*, Dr. Glenn allowed 10 percent impairment for the partial medial and lateral meniscectomy.

Dr. Glenn used the diagnostic-based estimate for determining appellant's impairment rating. He properly utilized the A.M.A., *Guides* in determining the impairment of the left lower extremity. Dr. Glenn's report is based on a proper history of injury and is appropriately detailed to constitute the special weight of the medical opinion evidence. He applied his findings on physical examination to the appropriate sections of the A.M.A., *Guides* in reaching his impairment rating. Dr. Glenn explained that the diagnosed-based estimate method was the most appropriate measure of impairment and explained how he determined the impairment, noting that he considered pain. He properly applied the A.M.A., *Guides* and determined that appellant had 10 percent impairment of the left lower extremity. This evaluation conforms to the A.M.A., *Guides*.

On October 19, 2008 Dr. Andrew A. Merola, an Office medical adviser reviewed Dr. Glenn's finding pursuant to the A.M.A., *Guides* and noted that he had properly applied Table 17-33.

Appellant contends on appeal that there was no conflict in the medical opinion at the time of the Office's referral to Dr. Glenn as Dr. Stark was not asked to evaluate the lower extremities and provided no testing or impairment rating. The Office properly determined that there was a conflict in medical opinion regarding her left lower extremity. While Dr. Stark's report mainly concerned the upper extremities, he reviewed the history of appellant's left knee injury and provided findings on examination. The physical findings of him were markedly different than those listed by Dr. Diamond. Thus, the Office medical adviser referred the matter for development on the conflict in the medical evidence. Appellant's argument that Dr. Glenn performed no motor strength assessment is not supported by his report. Dr. Glenn stated that he was unable to substantiate Dr. Diamond's finding of quadriceps or gastrocnemius loss of strength and listed normal hamstring and quadriceps strength. He provided reasoning for his impairment rating and his opinion is entitled to special weight.

### **CONCLUSION**

The Board finds that appellant has no more than 10 percent impairment of the left leg, for which she received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 22, 2009 is affirmed.

Issued: July 15, 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