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

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| **M.M., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1632** |
| | ) | **Issued: May 25, 2010** |
| **U.S. POSTAL SERVICE, POST OFFICE, Boston, MA, Employer** | ) | |

*Appearances:*
*William E. Shanahan, 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 June 11, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 27, 2009 decision, which affirmed the Office's February 25, 2009 schedule award decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e)(2), the Board has jurisdiction over the merits of this case.

### *ISSUE*

The issue is whether appellant has more than a 10 percent impairment of her left lower extremity, for which she received a schedule award.

### *FACTUAL HISTORY*

On January 22, 2004 appellant, then a 50-year-old general expedition clerk, injured her left knee when she was replacing equipment. She stopped work on January 23, 2004 and returned on January 29, 2004. The Office accepted appellant's claim for left knee sprain and bilateral tears of the left medial meniscus. It authorized arthroscopic surgeries, which were performed on June 15 and December 17, 2004. The Office also expanded the claim to include

lumbar sprain/strain and lumbosacral spondylosis. It authorized a right knee arthroscopy, which appellant underwent on February 14, 2006. Appellant received appropriate compensation benefits.

In a January 3, 2006 report, Dr. Thomas F. Holovacs, a Board-certified orthopedic surgeon and treating physician, advised that he did not believe that another left knee surgery would benefit appellant. He indicated that she had reached maximum medical improvement. Dr. Holovacs noted that appellant "may always feel some discomfort in her knee and feel the consequences of her articular cartilage injury and her meniscal injury down the road." He opined that her work status might be permanently altered such that she was on light-duty status for her left knee.

Appellant filed a claim for a schedule award for permanent impairment of the left lower extremity.

In a report dated June 9, 2008, the Office medical adviser noted that appellant had an arthroscopic medial meniscectomy on June 15, 2004 and a second arthroscopic procedure on December 17, 2004, which included a debridement and partial removal of the medial meniscus and chondroplasties in the medial and lateral compartments. He examined her and determined that she had mild tenderness with good range of motion. The Office medical adviser utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (A.M.A., *Guides*) (5th ed. 2001) and referred to Table 17-33.[1] He explained that appellant had an impairment of two percent for a partial medial meniscectomy. The Office medical adviser noted that, under Table 17-37,[2] the maximum lower extremity impairment for knee pain was equal to five percent. He referred to Table 16-10[3] and determined that a Grade 3, would provide 60 percent for pain that interferes with some activities. The Office medical adviser multiplied 60 percent by 5 percent for pain and determined that it would result in 3 percent impairment for pain. He combined the three percent for pain with the two percent for the partial medial meniscectomy, resulted in a total of five percent permanent impairment of the left lower extremity. The Office medical adviser indicated that appellant reached maximum medical improvement in December 2005, one year after arthroscopic surgery.

Accordingly, on June 20, 2008, the Office granted appellant a schedule award for five percent permanent impairment of the left lower extremity. The award covered a period of 14.4 weeks from June 8 to September 16, 2008.

On July 16, 2008 appellant's representative requested a hearing. He provided a June 12, 2008 report from Dr. Byron V. Hartunian, an orthopedic surgeon, who noted appellant's history of injury and treatment and utilized the A.M.A., *Guides.* Dr. Hartunian examined appellant and found that her squatting was limited to 50 percent of normal on the left side because of left knee pain, more than the right. Appellant had full motion of both knees with more crepitance on the

[1] A.M.A., *Guides*, 546.

[2] *Id*. at 552.

[3] *Id*. at 482.

left side. Dr. Hartunian also determined that there was weakness in quadriceps strength on the left and one inch of atrophy of the left quadriceps musculature. He diagnosed left knee progressive traumatic osteoarthritis, status post arthroscopic surgical debridements and opined that appellant reached maximum medical improvement. Dr. Hartunian referred to Table 17-6; Impairment Due to Unilateral Leg Muscle Atrophy and noted that appellant had a mild impairment of the left thigh which would result in an eight percent impairment of the leg.[4] He advised that this resulted in three percent whole person impairment. Dr. Hartunian also referred to Table 17-33[5] and advised that the meniscal injury and medial and lateral articular surface injury, would provide for an additional 20 percent impairment of the lower extremity or 8 percent whole person impairment. He combined the impairment ratings and advised that appellant had 11 percent whole person impairment. Dr. Hartunian opined that she was totally disabled for work due to the work injury. He also submitted reports noting appellant's disability status.

In November 6, 2008 decision, the Office hearing representative found that Dr. Hartunian's report was sufficient to warrant setting aside the June 20, 2008 award and remanded the case for further review by the Office medical adviser.

In a report dated January 9, 2009, the Office medical adviser reviewed the evidence from Dr. Hartunian. He noted that appellant's history included an arthroscopy on December 17, 2004, that involved debridement of the meniscal tear and her claim was expanded to include bilateral medial meniscus tear, a strain of the left medial collateral ligament, sprain lumbar region and lumbosacral spondylosis. The medical adviser indicated that the second arthroscopy consisted of debridement. He referred to Dr. Hartunian's examination, which found that the left quadriceps muscle had 3/4 inch of atrophy, full range of motion with crepitance and ability to squat only 50 percent of normal. The Office medical adviser explained that Dr. Hartunian referred to Table 17-6[6] and concurred that it allowed eight percent lower extremity impairment for the atrophy. However, he explained that Dr. Hartunian also referred to Table 17-33[7] and indicated that appellant was entitled to an additional 20 percent impairment due to medial and articular surface injury and meniscal damage. The medical adviser explained that Table 17-33 did not reference those injuries noted by Dr. Hartunian but only references articular fractures displaced or undisplaced. He advised that the 20 percent finding did not apply in appellant's case. The Office medical adviser also explained that there were no articular surface fractures noted or cited. He recommended that x-rays be obtained to determine articular space intervals, which would be an accurate way of determining degenerative arthritis of the knee.

In response to the request from the Office medical adviser, appellant's attorney submitted several medical reports. In a March 30, 2004 magnetic resonance imaging (MRI) scan of the left knee, read by Dr. John S. Labis, a Board-certified diagnostic radiologist, revealed medial and lateral meniscus tears with high-grade cartilage defects within the posterior superior medial

[4] *Id*. at 530.

[5] *Id*. at 546.

[6] *Id*. at 530.

[7] *Id*. at 546.

femoral condyle with subchondral cystic changes and mild chondromalacia of the patella. Also included was Dr. Holovacs June 15, 2004 operative report noting that he performed left knee arthroscopic meniscal debridement of the left knee. An October 4, 2004 x-ray of the left knee read by Dr. John F. Clement, a Board-certified diagnostic radiologist, revealed a tear of the medial meniscus. The operative report from December 17, 2004 reveals that Dr. Holovacs performed a left knee arthroscopy with meniscal debridement and left knee chondroplasty in the medial and lateral compartment.

In a January 30, 2009 report, the Office medical adviser reviewed the record and utilized the A.M.A., *Guides.* He noted Dr. Hartunian's findings and explained that, pursuant to Table 17-6,[8] appellant would be entitled to receive an eight percent lower extremity impairment due to atrophy. The Office medical adviser noted that Table 17-33[9] allowed two percent impairment for a partial medial meniscectomy. He also indicated that Table 17-33 did not allow impairment for articular surface injury unless the patella was involved. The Office medical adviser noted that there was no evidence of plateau fracture and thus no impairment was listed in Table 17-33 for chondroplasty. He opined that the total lower extremity impairment was equal to 10 percent. The Office medical adviser indicated that appellant reached maximum medical improvement on June 12, 2008.

Accordingly, on February 25, 2009, the Office granted appellant an additional schedule award for 5 percent permanent impairment of the left lower extremity, in addition to the previously awarded 5 percent for a total of 10 percent to the left lower extremity. The award covered a period of 14.4 weeks from February 15 to May 26, 2009.

On February 26, 2009 appellant's representative requested a hearing. On March 20, 2009 he changed this to a request for a review of the written record. Appellant's representative alleged that the Office medical adviser's report should not represent the weight of the medical evidence. He also alternatively argued that there was a conflict between Dr. Hartunian and the Office medical adviser.

By decision dated May 27, 2009, the Office affirmed the February 25, 2009 decision.

## ***LEGAL PRECEDENT***

Section 8107 of the Federal Employees' Compensation Act[10] and its implementing regulations[11] 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. 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

[8] *Id*. at 530.

[9] *Id*. at 547.

[10] 5 U.S.C. §§ 8101-8193.

[11] 20 C.F.R. § 10.404.

stands applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[12]

For lower extremity impairments due to meniscectomies or ligament injuries involving the knees, Table 17-1, page 525 of the A.M.A., *Guides* directs the clinician to utilize section 17.2j, beginning at page 545, as the appropriate method of impairment assessment.[13] Section 17.2j, entitled Diagnosis-Based Estimates, instructs the clinician to assess the impairment using the criteria in Table 17-33 at page 546, entitled Impairment Estimates for Certain Lower Extremity Impairments.[14] According to Table 17-33, a partial medial meniscectomy is equivalent to a two percent impairment of the lower extremity.[15]

The A.M.A., *Guides* provide for three separate methods for calculating the impairment of an individual: anatomic, functional and diagnosis based.[16] The evaluating physician must determine which method best describes the impairment of a specific individual based on patient history and physical examination.[17] When uncertain about which method to use, the evaluator should calculate the impairment using different alternatives and choose the method or combinations of methods that gives the clinically accurate impairment rating.[18] If more than one method can be used, the method that provides the higher impairment rating should be adopted.[19]

## ***ANALYSIS***

The Office accepted appellant's claim for left knee sprain and bilateral tears of the left medial meniscus. It also authorized arthroscopic surgeries on June 15 and December 17, 2004. The Office expanded the claim to include lumbar sprain/strain and lumbosacral spondylosis.[20]

In a report dated June 12, 2008, Dr. Hartunian, appellant's treating physician, examined appellant and utilized the A.M.A., *Guides.* He referred to Table 17-6 and noted that she had a mild impairment of the left thigh, which would result in an eight percent impairment of the lower extremity.[21] The Board notes that his examination findings revealed that appellant had three quarters to one inch of left quad atrophy compared to the right side and these would comport

[12] *Id*.

[13] A.M.A., *Guides* 525.

[14] *Id.* at 545.

[15] *Id.* at 546.

[16] *Id.* at 525.

[17] *Id.* at 548, 555.

[18] *Id.* at 526, 555.

[19] *Id*. at 527.

[20] The Office also authorized a right knee arthroscopy, which appellant underwent on February 14, 2006.

[21] A.M.A., *Guides* 530.

with this table. However, Dr. Hartunian referred to Table 17-33[22] and advised that the meniscal injury and medial and lateral articular surface injury, would provide for an additional 20 percent impairment of the lower extremity. However, the Board finds that it is unclear how he arrived at this determination as there is nothing in this table related to the accepted injuries to support a 20 percent finding. Thus, at best, Dr. Hartunian's report supports an impairment of eight percent to the lower extremity. The Board notes that he also prescribed whole person findings; however, neither the Act nor its regulations provide for a schedule award for whole person impairment.[23]

An Office medical adviser referred to Dr. Hartunian's report on January 30, 2009 and applied the relevant standards of the A.M.A., *Guides* to arrive at this conclusion regarding the permanent impairment of appellant's left lower extremity. He was in agreement with Dr. Hartunian with regard to the rating of eight percent for atrophy prescribed by Table 17-6. The Office medical adviser explained that appellant would be entitled to an impairment of two percent for a diagnosis-based estimate under Table 17-33, for her partial medial meniscectomy. He explained that Table 17-33 did not allow impairment for articular surface injury unless the patella was involved. The Office medical adviser also noted that there was no patella fracture. The Board finds that finding comports with Table 17-33, which provided a maximum of two percent for a partial medial or lateral meniscectomy.

However, the medical adviser erred in combining eight percent impairment for atrophy under Table 17-6 with two percent impairment for a partial meniscectomy under Table 17-33 for a diagnosis-based estimate. The Board notes that Table 17-2 of the A.M.A., *Guides*, a cross-usage chart, clearly precludes combining ratings for atrophy with ratings for diagnosis-based estimates.[24] Thus, the Office medical adviser improperly combined the findings for atrophy and the meniscectomy in finding that appellant had 10 percent impairment of the left lower extremity. The Board finds that the medical evidence supports that appellant has no more than eight percent impairment of the left leg pursuant to the A.M.A., *Guides*.

Consequently, appellant had not established that she has any greater impairment than that for which she has already received a schedule award.[25]

On appeal, appellant's representative argued that Dr. Hartunian's opinion was sufficient to establish appellant's permanent impairment or, in the alternative created a conflict with the report of the Office medical adviser. However, Dr. Hartunian's opinion was of diminished probative value as it was not, as noted, based or a correct application of the A.M.A., *Guides*.[26]

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[22] *Id*. at 546.

[23] *See James E. Jenkins*, 39 ECAB 860 (1988); 5 U.S.C. § 8101(19).

[24] A.M.A., *Guides* 526.

[25] Following issuance of the Office's May 27, 2009 decision, appellant submitted additional evidence to the Office. However, the Board may not consider such evidence for the first time on appeal as its review is limited to the evidence that was before the Office at the time of its decision. *See* 20 C.F.R. § 501.2(c).

[26] An opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment. *I.F.*, 60 ECAB ___ (Docket No. 08-2321, issued May 21, 2009).

As his report did not comport with the A.M.A., *Guides*, it did not represent the weight of the medical evidence or give rise to a conflict in the medical evidence.

## ***CONCLUSION***

The Board finds that appellant did not meet her burden of proof to establish that she has more than a 10 percent impairment of her left lower extremity, for which she received a schedule award.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 27, 2009 is affirmed, as modified.

Issued: May 25, 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