United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket Nos. 10-197 & 10-202**
	)	**Issued: October 1, 2010**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Leavenworth, KS, Employer	)	

Appearances:
Jeffrey P. Zeelander, 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 October 26, 2009 appellant filed a timely appeal from the October 1 and 13, 2009 merit decisions of the Office of Workers' Compensation Programs granting schedule awards. 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 met his burden of proof to establish that he has more than a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg, for which he received schedule awards.

FACTUAL HISTORY

The Office accepted that on January 17, 2007 appellant, then a 50-year-old electrician, sustained a partial tear of the medial meniscus of his left knee, derangement of the posterior horn of the medial meniscus of his left knee and strains of his left knee and leg due to slipping on ice at work. On July 26, 2007 Dr. Stephen W. Munns, an attending Board-certified orthopedic

surgeon, performed a partial medial meniscectomy on appellant's left knee with debridement of the patella, femoral sulcus and femoral condyles and resection of the medial synovial plica. The surgery was authorized by the Office.

The Office accepted that on March 27, 2007 appellant sustained a partial tear of the medial meniscus of his right knee when he caught his foot on an anchor and stumbled forward while at work.[1] Appellant received wage-loss compensation from the Office for periods of disability.

In an August 15, 2008 report, Dr. Munns provided a rating of appellant's left leg impairment under the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. Munns advised that appellant had a 30 percent impairment of his left leg based on a 20 percent impairment for the arthritis,[2] a 5 percent rating for the partial medial meniscectomy and a 5 percent rating for pain.

On September 10, 2008 appellant filed a claim for a schedule award.

On January 29, 2009 Dr. Daniel D. Zimmerman, a Board-certified orthopedic surgeon serving as an Office medical adviser, found that the impairment evaluation by Dr. Munns was inadequate because he did not provide a complete assessment of appellant's left leg condition, including the results of range of motion testing. He noted that Dr. Munns provided a higher rating for the partial medial meniscectomy than was allowed by the A.M.A., *Guides* and that he did not support the pain rating made under Chapter 18 of the A.M.A., *Guides.*

In a December 15, 2008 report, Dr. Steven V. Smith, an attending Board-certified orthopedic surgeon, stated that, based on the A.M.A., *Guides*, appellant had a seven percent permanent impairment of his right leg "at the level of the knee for his twisting injury necessitating arthroscopy for treatment of a patellofemoral chondral lesion, a medial meniscus tear and a symptomatic plication."[3] On January 29, 2009 Dr. Zimmerman stated that Dr. Smith's December 15, 2008 impairment rating was not made in accordance with the standards of the A.M.A., *Guides.*

In a January 26, 2009 report, Dr. Smith noted that based on the sixth edition of the A.M.A., *Guides* (6th ed. 2009) appellant had a seven percent impairment of his left leg based on a two percent rating for his plica syndrome requiring surgical intervention, a two percent rating for his partial medial meniscectomy and a three percent rating for his patellofemoral chondromalacia.[4] On June 7, 2009 Dr. Zimmerman stated that Dr. Smith's January 26, 2009

[1] Appellant underwent a partial medial meniscectomy on his right knee in early 2006. He did not undergo additional right knee surgery.

[2] In a December 5, 2007 progress note, Dr. Munns indicated that diagnostic testing in both knees showed that appellant had "approximately two millimeters of medial compartment cartilage space with no secondary degenerative changes as of yet." On January 23, 2008 Dr. Munns stated that appellant's medial compartment cartilage space was maintained at 50 percent of normal.

[3] Dr. Smith did not indicate what edition of the A.M.A., *Guides* he applied.

[4] Dr. Smith used the Knee Regional Grid on pages 509-11.

impairment rating was incorrect because he attempted to rate multiple conditions under the Knee Regional Grid when it was permissible to rate only one condition under this table.

The Office referred appellant to Dr. George Varghese, a Board-certified physical medicine and rehabilitation physician, for evaluation and an assessment of the impairment to both legs. On August 11, 2009 Dr. Varghese reviewed appellant's factual and medical history, including the nature of his work injury and medical treatment. With respect to the left leg, Dr. Varghese found that there was no effusion or any evidence of any inflammatory changes. Range of motion was measured from 0 to 130 degrees and strength was normal. There was no instability detected and left thigh circumference was 52 centimeters. With respect to the right leg, Dr. Varghese stated that he found no swelling, inflammatory changes, hyperesthesia or vasomotor changes. Range of motion was measured from 0 to 135 degrees. Medial and lateral stability was normal, there was no effusion and right thigh circumference was 51.5 centimeters. Dr. Varghese stated that the date of maximum medical improvement was July 21, 2009.

Dr. Varghese noted that his impairment rating was performed under the sixth edition of the A.M.A., *Guides*. Under Table 16-3 (Knee Regional Grid), he used the diagnostic criteria relating to the partial medial meniscus tear on the right and left sides. Dr. Varghese indicated that appellant fell under Class I of the Knee Regional Grid. With respect to appellant's functional history, he stated that he was able to do self-care activities, but his pain and stiffness interfered with some vigorous activities. Using Table 16-6 relating to functional history, Dr. Varghese gave a grade modifier of two for each leg. For the physical examination, under Table 16-7, he gave a grade modifier of two for the left side and a grade modifier of one for the right side. For the clinical studies, under Table 16.8, Dr. Varghese gave a grade modifier of two for each leg. He further stated:

> "Based on the review of the medical history and physical examination, I did not use the sections on peripheral nerve impairment, [complex regional pain syndrome], amputation and range of motion for the impairment rating.
>
> "I used the Net Adjustment Formula as instructed…. Using this formula, his net adjustment for the right side is minus 2 and the left side is minus 1. For the final rating purposes, I used Table 16-9. It was graded as Class I. Default for Class I is 5. By using the Net Adjustment Formula, I moved one point to the left for the left side and 2 points to the left for the right side. Based on this formula, his permanent partial impairment rating for the right side is three percent for the extremity and for the left side is four percent for the extremity."

On September 17, 2009 Dr. Zimmerman reviewed the Knee Regional Grid of the sixth edition of the A.M.A., *Guides* and agreed with Dr. Varghese that appellant had a four percent impairment to his left leg and a three percent impairment to his right leg.

In an October 1, 2009 decision, the Office granted appellant a schedule award for a four percent permanent impairment of his left leg. In an October 13, 2009 decision, the Office granted a schedule award for a three percent permanent impairment of appellant's right leg. For both awards, the Office relied on the impairment ratings provided by Dr. Varghese as adopted by Dr. Zimmerman.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[5] and its implementing regulations[6] 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.[7] For Office decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used for evaluating permanent impairment.[8]

In determining impairment for the lower extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the lower limb to be rated. With respect the knee, the relevant portion of the leg for the present case, reference is made to Table 16-3 (Knee Regional Grid) beginning on page 509. Then the associated class is determined from the Knee Regional Grid and the adjustment grid and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class, modified by the adjustments as calculated.[9] Under Chapter 2.3, evaluators are directed to provide reasons for their impairment rating choices, including choices of diagnoses from regional grids and calculations of modifier scores.[10]

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[11] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[12]

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[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id*.

[8] *See* FECA Bulletin No. 9-03 (issued March 15, 2009). For Office decisions issued before May 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

[9] *See* A.M.A., *Guides* (6th ed. 2009) 499-500.

[10] *Id.* at 23-24.

[11] *Russell F. Polhemus*, 32 ECAB 1066 (1981).

[12] *See Robert F. Hart*, 36 ECAB 186 (1984).

ANALYSIS

The Office accepted that on January 17, 2007 appellant sustained a partial tear of the medial meniscus of his left knee, derangement of the posterior horn of the medial meniscus of his left knee and strains of his left knee and leg. On July 26, 2007 Dr. Munns, an attending Board-certified orthopedic surgeon, performed a partial medial meniscectomy on appellant's left knee with debridement of the patella, femoral sulcus and femoral condyles and resection of the medial synovial plica. The Office accepted that on March 27, 2007 appellant sustained a partial tear of the medial meniscus of his right knee.[13]

Appellant claimed that he was entitled to schedule award compensation for his legs due to his accepted work injuries. The Board finds that the Office properly referred appellant to Dr. Varghese, a Board-certified physical medicine and rehabilitation physician, after two attending physicians provided ratings that were not made in accordance with the standards of the A.M.A., *Guides*.

In an August 15, 2008 report, Dr. Munns provided an assessment of appellant's left leg impairment under the fifth edition and found that he had a 30 percent impairment of his left leg based on a 20 percent impairment rating for the arthritic condition of his left knee, a 5 percent rating for the partial medial meniscectomy of his left knee and a 5 percent rating for pain. Dr. Zimmerman, a Board-certified orthopedic surgeon serving as an Office medical adviser, properly stated that the impairment evaluation of Dr. Munns was inadequate because he did not provide a complete assessment of appellant's left leg condition, he provided a higher rating for the partial medial meniscectomy than was allowed by the A.M.A., *Guides* and he did not support the pain rating under Chapter 18 of the A.M.A., *Guides*.[14]

In a December 15, 2008 report, Dr. Smith, an attending Board-certified orthopedic surgeon, stated that, based on the A.M.A., *Guides*, appellant had a seven percent permanent impairment of his right leg "at the level of the knee for his twisting injury necessitating arthroscopy for treatment of a patellofemoral chondral lesion, a medial meniscus tear and a symptomatic plication."[15] In a January 26, 2009 report, Dr. Smith noted that based on the sixth edition of the A.M.A., *Guides* appellant had a seven percent impairment of his left leg based on a two percent rating for his plica syndrome requiring surgical intervention, a two percent rating for his partial medial meniscectomy and a three percent rating for his patellofemoral chondromalacia. Dr. Zimmerman properly found that these ratings were not made in accordance with the A.M.A., *Guides*. With respect to the January 26, 2009 rating, Dr. Zimmerman properly noted that Dr. Smith rated multiple conditions under the Knee Regional Grid when only one condition was permissible to rate under this table.[16]

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[13] Appellant underwent a partial medial meniscectomy on his right knee in early 2006. He did not undergo additional right knee surgery.

[14] *See* A.M.A., *Guides* (5th ed 2001) 546, 565-86.

[15] Dr. Smith did not indicate what edition of the A.M.A., *Guides* he used, but it appears that he attempted to apply the sixth edition.

[16] *See* A.M.A., *Guides* (6th ed. 2009) 509-11, Table 16-3 (Knee Regional Grid).

On August 11, 2009 Dr. Varghese detailed appellant's factual and medical history and reported examination findings. Under Table 16-3 (Knee Regional Grid) of the sixth edition of the A.M.A., *Guides*, he used the diagnostic criteria relating to the partial medial meniscus tear on the right and left sides. Dr. Varghese indicated that appellant fell under Class I of the Knee Regional Grid. With respect to appellant's functional history, he stated that he was able to do self-care activities, but his pain and stiffness interfered with some of the vigorous activities. Dr. Varghese noted that, using Table 16-6 relating to functional history, he gave a grade modifier of two for each leg. For the physical examination, under Table 16-7, he gave a grade modifier of two for the left side and a grade modifier of one for the right side. For the clinical studies, under Table 16.8, Dr. Varghese gave a grade modifier of two for each leg.[17] He then used these grade modifiers to apply the net adjustment formula to the default position of Class I identified in Table 16-9.[18] He concluded that appellant had a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg.[19]

The Board notes, however, that Dr. Varghese did not adequately explain how he reached his determination of the various grade modifiers, namely those for functional history, physical examination and clinical studies. With respect to the physical examination grade modifier, he gave a grade modifier of two for the left side and a grade modifier of one for the right side. However, he did not explain the medical reasons for this determination of grade modifiers for appellant's legs. Appellant's attorney's asserted on appeal that arthritic joint space narrowing in appellant's knees was not adequately considered. The record reveals that appellant had such narrowing and the clinical studies grade modifier allows for consideration of this type of condition.[20] Dr. Varghese did not adequately explain whether he factored appellant's arthritis into the calculation of the clinical studies grade modifier.

For these reasons, the impairment rating of Dr. Varghese is in need of clarification.[21] Dr. Varghese should be provided an opportunity to clarify his impairment evaluation. If he is unwilling or unable to do so, the Office should undertake additional development to arrive at a reasoned determination regarding the impairment of appellant's legs. After such development as it deems necessary, the Office shall issue an appropriate decision on this matter.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant has more than a four percent permanent impairment of his left leg and a three percent permanent

[17] *Id.* at 509-22. *See supra* note 9.

[18] *Id.* at 509-22

[19] The Office issued decisions on October 1 and 13, 2009 granting schedule award compensation for these impairments. It was appropriate for the Office to require evaluation under the sixth edition of the A.M.A., *Guides* as its schedule award decisions were issued on or after May 1, 2009. *See supra* note 8.

[20] *See* A.M.A., *Guides* 519, Table 16-8.

[21] *See supra* notes 10 through 12.

impairment of his right leg, for which he received schedule awards. The case is remanded to the Office for further development to be followed by an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the October 13 and 1, 2009 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded to the Office for proceedings consistent with this decision of the Board.

Issued: October 1, 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