

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

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D.C., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Philadelphia, PA, Employer )

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**Docket No. 10-379  
Issued: September 17, 2010**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 23, 2009 appellant filed a timely appeal from the November 9, 2009 merit decision of the Office of Workers' Compensation Programs concerning entitlement to schedule award compensation. 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 more than a 32 percent permanent impairment of his left leg, for which he received schedule awards.

**FACTUAL HISTORY**

This is the second appeal in this case. The Board issued a decision on February 4, 2002 affirming the Office's finding that appellant did not meet his burden of proof to establish that he has more than a 32 percent permanent impairment of his left leg, for which he received schedule

awards.<sup>1</sup> In a March 24, 1986 decision, the Office granted appellant a schedule award for a 20 percent permanent impairment of his left leg. Appellant disagreed with the impairment rating and requested an additional award. In a June 23, 2000 decision, the Office granted appellant a schedule award for an additional 12 percent permanent impairment of his left leg for a total left leg impairment of 32 percent. The Board found that the schedule award decisions of the Office were proper.

In April 2009 appellant again filed a claim for additional permanent impairment of his left leg. He submitted a June 1, 2009 report in which Dr. Daisy A. Rodriguez, an attending Board-certified internist, determined that he had a 42 percent permanent impairment of his left leg under the standards of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009). Dr. Rodriguez evaluated appellant's left knee condition under Table 16-3 (Knee Regional Grid) on pages 509 through 511. She chose to evaluate three separate diagnostic criteria for appellant's left knee. Under the meniscal injury category, Dr. Rodriguez determined that appellant had a three percent rating for his left partial medial meniscectomy. With respect to primary knee joint arthritis of the left knee she found a 28 percent impairment due to a one centimeter joint space. For patellofemoral arthritis, Dr. Rodriguez calculated a 16 percent impairment due to a one centimeter joint space. Using the Combined Values Chart on page 604 of the sixth edition of the A.M.A., *Guides* she combined these three figures to equal 42 percent.

The Office referred the case record, including the June 1, 2009 report of Dr. Rodriguez, to Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, serving as an Office medical adviser. Dr. Berman was asked to evaluate the permanent impairment of appellant's left leg under the standards of the sixth edition of the A.M.A., *Guides*.

In a July 26, 2009 report, Dr. Berman discussed the history of appellant's condition and noted that he had reviewed the medical evidence, including the June 1, 2009 report of Dr. Rodriguez. He indicated that an examination was carried out by Dr. Rodriguez on January 24, 2009 but that this examination did not record any ranges of motion and did not document any joint space narrowing on x-rays. Dr. Berman summarized the calculations that Dr. Rodriguez made in her June 1, 2009 report and asserted that the only diagnostic criteria analysis she made which was supported by medical documentation was the determination that appellant had a three percent impairment due to his left partial medial meniscectomy. He posited that the total impairment of appellant's left leg was three percent.

The Office requested that another Office medical adviser provide additional clarification of appellant's permanent leg impairment. On August 7, 2009 Dr. Morley Slutsky, a Board-certified orthopedic surgeon, indicated that Dr. Rodriguez erroneously rated three diagnoses for the same knee region and then combined them to arrive at the total left lower extremity impairment of 42 percent. He indicated that the sixth edition of the A.M.A., *Guides* only allows for a rating of the most impairing diagnosis in a region. Dr. Slutsky indicated that none of the three diagnosis-based ratings made by Dr. Rodriguez exceeded 32 percent of the left leg.

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<sup>1</sup> Docket No. 01-1558 (issued February 4, 2002). The Office accepted that on January 29, 1984 appellant, then a 37-year-old mail handler, sustained derangement of his left knee and a torn left medial meniscus. On March 21, 1984 appellant underwent a left partial medial meniscectomy which was authorized by the Office.

Therefore, there was no justification for an impairment rating to exceed the amount previously issued of 32 percent of the left leg.

After review by the Office medical advisers, the Office determined that appellant did not have any additional permanent impairment of his left leg. In its August 10, 2009 decision, the Office denied appellant's request for an increased schedule award.

Appellant requested reconsideration of his claim and submitted an August 26, 2009 report in which Dr. Rodriguez provided additional findings on physical examination and diagnostic testing. She provided range of motion findings, obtained on June 1, 2009, for appellant's hips, knees and ankles. Dr. Rodriguez indicated that x-ray testing from December 15, 2008 showed that appellant had a cartilage interval of one millimeter in his left medial joint compartment and a cartilage interval of one millimeter in his left patella femoral compartment.

On October 30, 2009 Dr. Slutsky indicated that he had reviewed the August 19, 2009 report of Dr. Rodriguez. He again concluded that the opinion of Dr. Rodriguez did not show that appellant had more than a 32 percent permanent impairment of his left leg. Dr. Slutsky stated that there was no additional increase under the sixth edition of the A.M.A., *Guides* over and above the 32 percent previously issued. He noted that Dr. Rodriguez rated three diagnoses (two of which are not accepted by the Office -- primary knee joint arthritis and patellofemoral arthritis). Dr. Slutsky stated that the sixth edition of the A.M.A., *Guides* only allows that one diagnosis in the knee region to be rated which yields the highest impairment. In this case, the greatest impairment Dr. Rodriguez provided was for primary knee joint arthritis (not an accepted condition) and she assigned a 28 percent impairment rating of the left leg for this condition. Dr. Slutsky indicated that the 28 percent impairment rating for the left leg did not exceed the previously assigned 32 percent impairment rating for the left leg.

In a November 9, 2009 decision, the Office affirmed its August 10, 2009 decision. It indicated that the reports of the Office medical advisers properly explained that the reports of Dr. Rodriguez did not show that appellant had more than a 32 percent permanent impairment of his left leg.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulations<sup>3</sup> 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

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (1999).

implementing regulations as the appropriate standard for evaluating schedule losses.<sup>4</sup> The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.<sup>5</sup>

### ANALYSIS

The Office accepted that on January 29, 1984 appellant sustained derangement of his left knee and a torn left medial meniscus. On March 21, 1984 he underwent a left partial medial meniscectomy which was authorized by the Office. Appellant received schedule awards for a total permanent impairment of his left leg of 32 percent and, in a February 4, 2002 decision, the Board affirmed the Office's determination in this regard.

In April 2009 appellant again filed a claim for additional permanent impairment of his left leg. In the June 1, 2009 report, Dr. Rodriguez determined that appellant had a 42 percent permanent impairment of his left leg under the standards of the sixth edition of the A.M.A., *Guides*. She evaluated three separate diagnostic criteria for appellant's left knee under Table 16-3 (Knee Regional Grid).<sup>6</sup> Under the meniscal injury category, Dr. Rodriguez determined that appellant had a three percent rating for his left partial medial meniscectomy. With respect to primary knee joint arthritis of the left knee she found a 28 percent impairment due to a one centimeter joint space. For patellofemoral arthritis, Dr. Rodriguez calculated a 16 percent impairment due to a one centimeter joint space.<sup>7</sup> Using the Combined Values Chart on page 604 of the sixth edition of the A.M.A., *Guides* she combined these three figures to equal 42 percent.<sup>8</sup>

The Board finds that Dr. Slutsky, a Board-certified orthopedic surgeon serving as an Office medical adviser, properly explained why the opinion of Dr. Rodriguez did not show that appellant has more than a 32 percent permanent impairment of his left leg. In reports dated August 7 and October 30, 2009, Dr. Slutsky stated that Dr. Rodriguez erroneously rated three diagnoses for the same knee region under Table 16-3 of the sixth edition of the A.M.A., *Guides* and then combined them to arrive at the total left leg impairment of 42 percent. Dr. Slutsky correctly noted that the sixth edition of the A.M.A., *Guides* only allows for a rating of the most impairing diagnosis in a region.<sup>9</sup> He indicated that none of the three diagnosis-based ratings made by Dr. Rodriguez exceeded 32 percent of the left leg and therefore there was no basis to find that appellant had more than the 32 percent left leg impairment already granted.

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<sup>4</sup> *Id.*

<sup>5</sup> FECA Bulletin No. 09-03 (issued March 15, 2009).

<sup>6</sup> A.M.A., *Guides* 509-11, Table 16-3.

<sup>7</sup> Dr. Rodriguez provided values for the grade modifiers within the various adjustment grids, including those for functional history, physical examination and clinical studies, which can alter the default impairment values found in Table 16-3. See A.M.A., *Guides* 515-20.

<sup>8</sup> In an August 26, 2009 report, Dr. Rodriguez provided additional findings on physical examination and diagnostic testing. She did not provide any additional impairment calculations.

<sup>9</sup> A.M.A., *Guides* 497-500.

On appeal appellant's attorney argued that the sixth edition of the A.M.A., *Guides* does not adequately allow for the consideration of preexisting conditions in impairment ratings as dictated by Office procedure. The Board notes that the Office has explicitly adopted the standards of the sixth edition of the A.M.A., *Guides*, effective May 1, 2009, for evaluating permanent impairment.<sup>10</sup> Moreover, with respect to the knee region, preexisting conditions play a role in determining grade modifiers within the various adjustment grids, including those for functional history, physical examination and clinical studies, which in turn can alter the default impairment values found in Table 16-3.<sup>11</sup>

For these reasons, appellant did not show more than a 32 percent left leg impairment and the Office properly denied his claim for increased impairment.

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish more than a 32 percent permanent impairment of his left leg, for which he received schedule awards.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 9, 2009 is affirmed.

Issued: September 17, 2010  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> See *supra* note 5.

<sup>11</sup> See A.M.A., *Guides* 509-20.