United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
	)	
and	)	**Docket No. 09-711**
	)	**Issued: November 20, 2009**
U.S. POSTAL SERVICE, HUNTING PARK STATION, Philadelphia, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 22, 2009 appellant, through counsel, filed a timely appeal from a September 18, 2008 merit decision of the Office of Workers' Compensation Programs regarding a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant has more than two percent permanent impairment to his right lower extremity, for which he received a schedule award.

On appeal, appellant's representative contends that appellant has greater impairment.

FACTUAL HISTORY

On December 16, 1995 appellant, then a 31-year-old letter carrier, slipped while getting into his vehicle while collecting mail. Two days later he experienced right knee pain, swelling and locking. The Office accepted the claim for a sprained right knee. On March 15, 1996 appellant underwent an authorized right knee arthroscopy for a Grade 2 medial meniscus tear

with synovitis. He returned to light duty, working six hours a day, on June 17, 1996. Appellant started working eight hours a day on August 9, 1996.

On July 21, 2008 appellant filed a claim for a schedule award (Form CA-7). In a May 8, 2008 medical report, Dr. David Weiss, an osteopath, stated that appellant sustained a work-related injury to his right knee in 1989 and a subsequent right knee injury in 1995 after slipping and falling at work. He noted appellant's complaints of right knee pain and stiffness, which was constant and daily. Appellant also complained of swelling and episodes of instability and that a change in weather exacerbated his pain. He reported that he could stand comfortably for 30 minutes but that he could no longer perform kneeling or squatting or any recreational activities. Appellant also noted that prolonged driving exacerbated his pain. Physical examination of the right knee revealed well-healed portal arthroscopy scars with no gross effusion. Range of motion from flexion-extension was 0 to 120 out of 140 degrees. Patellofemoral compression produced marked crepitus and pain. Patellar apprehension and inhibition signs produced pain. Dr. Weiss noted tenderness along the undersurface of the medial patellar facet, over the medial joint line and the medial femoral condoyle and crepitus involving the medial joint compartment. Knee joint circumference measured 42.5 centimeters on the right and 42 centimeters on the left. Gastrocnemius circumference measured 42 centimeters on both the right and left. Quadriceps circumference 10 centimeters above the patella measured 52.5 centimeters on the right and 53 centimeters on the left. Using muscle strength testing, Dr. Weiss graded gastrocnemius at five of five on the right and graded quadriceps four of five on the right. He noted that appellant ambulated with the use of an open patellar brace for physiologic support and exhibited a noticeable right lower extremity limp. Dr. Weiss diagnosed post-traumatic internal derangement with a Grade 2 tear of the medial meniscus, post-traumatic synovitis, attenuated anterior cruciate ligament and post-traumatic chondromalacia patella to the right knee. He also diagnosed aggravation of a preexisting 1989 service-related injury, status post arthroscopic surgery and degenerative joint disease of the right knee. Dr. Weiss opined that appellant sustained 12 percent impairment due to a grade of 4 of 5 in motor strength deficit of the right quadriceps in accordance with Table 17-8, on page 532 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, fifth edition.[1] He added three percent impairment for pain citing to Figure 18-1 on page 574, for a total 15 percent right lower extremity impairment. Dr. Weiss noted that the 1995 work injury was the competent producing factor of appellant's subjective and objective findings.

On July 31, 2008 the Office forwarded appellant's record, together with a statement of accepted facts and a copy of the medical report from Dr. Weiss, to an Office medical adviser for an evaluation of permanent impairment.

In an August 10, 2008 medical report, Dr. Arnold T. Berman, a Board-certified orthopedic surgeon, found that appellant sustained two percent permanent impairment of the right lower extremity with a maximum medical improvement date of May 8, 2008. He disagreed with Dr. Weiss' finding of 12 percent permanent impairment based on quadriceps weakness. Dr. Berman cited to page 531 of the A.M.A., *Guides*, which states that for manual muscle testing to be valid, it should be concordant with other pathologic signs and medical evidence as the

[1] A.M.A., *Guides* (5th ed. 2001).

testing depends on the examinee's cooperation and is subject to his conscious or unconscious control. He noted that the quadriceps circumference only reflected a difference of .5 centimeters, the difference between 52.5 and 53 centimeters, which was not significant and within the margin of error representing one percent. Dr. Berman also opined that appellant's continuing to work as a mail clerk on a full-time basis indicated normal usage and no evidence of weakness. Additionally, he stated that there was no significant pathology to indicate an expectation of weakness as there was only a superficial tear of the posterior horn of the medial meniscus and fraying of no more than 20 percent of the anterior cruciate ligament. Dr. Berman opined that an impairment rating on the basis of motor strength deficit of the quadriceps was not recommended. Further, he noted that the pain-related impairment rating was not appropriate. Dr. Berman found that appellant's clinical presentation did not apply to the three categories on page 570 of the A.M.A., *Guides* where a pain-related impairment was recommended. Although appellant had some underlying osteoarthritic condition that could represent a cause of ongoing discomfort, however, this was not an accepted condition. Dr. Berman calculated that appellant sustained two percent right lower extremity impairment due to a partial medial menisectomy according to Table 17-33 on page 546 of the A.M.A., *Guides*. He noted that the difference of appellant's knee joint circumference was .5 centimeters, which equaled zero percent impairment according to Table 17-6 on page 530. Dr. Berman stated that this underscored his previous findings related to strength and atrophy.

By decision dated September 18, 2008, the Office granted appellant a schedule award for a two percent permanent impairment of the right lower extremity with a maximum medical improvement date of May 8, 2008.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[2] and its implementing regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or the 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.[4]

ANALYSIS

The Office accepted that appellant sustained a right knee sprain as a result of the December 16, 1995 work-related fall. It also authorized a right knee arthroscopy, which appellant underwent on June 17, 1996. The issue is whether appellant sustained greater than two

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id*.

percent permanent impairment to the right lower extremity causally related to his employment injury.

In support of his claim for a schedule award, appellant submitted a May 8, 2008 medical report from Dr. Weiss who opined that appellant sustained 15 percent permanent impairment to the right lower extremity. Dr. Weiss determined that appellant sustained 12 percent impairment for motor strength deficit of grade 4 of 5 the right quadriceps in accordance with Table 17-8, on page 532 of the A.M.A., *Guides*.[5] Further, he added three percent impairment for pain, citing Figure 18-1 on page 574.[6]

The Board finds that Dr. Weiss did not properly utilize the A.M.A., *Guides* in rating appellant's permanent impairment to his right lower extremity. Dr. Weiss based his determination of 12 percent impairment on manual muscle testing resulting in lower extremity weakness. However, in section 17.2e, the A.M.A., *Guides* state that, for manual muscle testing to be valid, the results should be concordant with other observable pathologic signs and medical evidence.[7] Further, it provides that, if measurements are made by one examiner, they should be consistent on different occasions.[8] The A.M.A., *Guides* also state that candidates whose performance is inhibited by pain are not good candidates for manual muscle testing and that other evaluation methods should be considered.[9] Dr. Weiss did not support his use of the manual muscle test results with other observable pathologic signs and medical evidence, nor did he establish that he had performed the tests with consistent results on different occasions. Moreover, he reported appellant's pain involving his right knee as 6 out of 10, which would inhibit appellant's performance during the test. In accordance with the A.M.A., *Guides*, appellant's permanent impairment should be rated based on other evaluation methods.[10]

With regard to Dr. Weiss' addition of three percent impairment for pain under Chapter 18, the A.M.A., *Guides* provides that impairment ratings include allowances for pain that individuals typically experience when they suffer from various injuries or diseases. As such, examiners should not use Chapter 18 for any condition that can be adequately rated on the basis of the rating systems given in other chapters of the A.M.A., *Guides*.[11] Dr. Weiss did not explain why appellant's impairment could not be adequately calculated using Chapter 17, addressing

[5] A.M.A., *Guides* 532.

[6] *Id*. at 574.

[7] *Id*. at 531.

[8] *Id*.

[9] *Id*.

[10] *See R.H.*, 59 ECAB ___ (Docket No. 07-2286, issued September 19, 2008).

[11] *Supra* note 5 at 570-71.

lower extremity impairments.[12] Thus, he did not justify the addition of three percent impairment for pain.[13]

In an August 10, 2008 medical report, Dr. Berman, the Office medical adviser, disagreed with Dr. Weiss' impairment rating. He calculated a rating of two percent permanent impairment due to the partial medial menisectomy, in accordance with Table 17-33 on page 546 of the A.M.A., *Guides*.[14] Where an attending physician incorrectly applies the A.M.A., *Guides* in calculating permanent impairment, the Office may follow the advice and rating of its medical adviser where he has properly utilized the A.M.A., *Guides*.[15] The Board finds that Dr. Berman properly applied the A.M.A., *Guides* in calculating appellant's permanent impairment rating at two percent. Thus, his report constitutes the weight of the medical evidence[16] and establishes that appellant has no more than a two percent permanent impairment of his right lower extremity, for which he received a schedule award.

CONCLUSION

The Board finds that appellant did not establish that he sustained greater than two percent permanent impairment to his lower extremity, for which he received a schedule award.

[12] Further, the cross-usage chart at Table 17-2, page 526, precludes combining muscle strength impairment with pain.

[13] *See Frantz Ghassan*, 57 ECAB 349 (2006).

[14] *Supra* note 5 at 546.

[15] *See Laura Heyen*, 57 ECAB 435 (2006).

[16] *See Linda Beale*, 57 ECAB 429 (2006).

ORDER

IT IS HEREBY ORDERED THAT the September 18, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 20, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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