United States Department of Labor
Employees' Compensation Appeals Board

P.B., Appellant	)	
	)	
and	)	**Docket No. 06-1124**
	)	**Issued: December 5, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Trenton, NJ, Employer	)	

Appearances:
Ron Watson, for the appellant
Thomas G. Giblin, Esq., for the Director

Oral Argument November 14, 2006

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2006 appellant filed a timely appeal from a January 6, 2006 Office of Workers' Compensation Programs' decision, adjudicating his schedule award claim. 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 has any impairment of his right leg entitling him to a schedule award.

FACTUAL HISTORY

This case was previously before the Board.[1] By decision dated August 19, 2004, the Board affirmed a September 10, 2003 Office decision denying appellant's claim for a schedule award. The Board's August 19, 2004 decision is incorporated herein by reference.[2]

On September 4, 2004 appellant requested reconsideration and submitted additional evidence. In a February 16, 2004 report, Dr. Blum provided a history of appellant's condition and findings on physical examination. He stated:

> "[Appellant] revealed a range of motion of his right knee of approximately 110 degrees actively. He still had noticeable quad[riceps] atrophy approximately 10 [centimeters] above his right knee. [Appellant] was approximately 2.5 [centimeters] smaller than 10 [centimeters] above the left knee. In addition, he was very tender over an area of calcification at the distal pole of his patella. [Appellant] had no significant effusion and ligamentously, it was a stable knee. He did obtain full extension. [Appellant's] neurologic status was intact. His vascular status, likewise, was intact.
>
> "I feel that the deficits in [appellant's] right leg are causally related to his injury on [January 14, 1999]. I feel that he is currently at maximum medical improvement and reached that in approximately May 2000.
>
> "Using the [American Medical Association], *Guide*[*s*] *to the Evaluation of Permanent Impairment*, fifth edition, [appellant] was given an impairment rating as follows.
>
> "I first assessed the different methods that [appellant's] [impairment] can be evaluated using [T]able 17-1. The assessment type under anatomic methods, would include muscle atrophy and arthritis of the joints. Under the functional assessment type, his involvement would include range of motion and muscle strength. I also reviewed the diagnosis-based assessment type and the specific diagnosis was not listed in Table 17-33, so this method was not chosen. I did feel that there were a couple of diagnoses that were close, but none were exact. After reviewing the specific total body and the lower extremity impairment percentages of each method in both the anatomic and the functional assessment types, I found that a number of these could not be combined according to the Cross-Usage Chart 17-2. Of the four assessment type methods that were previously listed, the method chosen that would give the highest … lower extremity impairment percentage is muscle strength. Table 17-7 lists a 0 to 5 grading system for

[1] Docket No. 04-1073 (issued August 19, 2004).

[2] On January 19, 1999 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim alleging that on that date he slipped in the performance of duty, injuring his right leg. On January 21, 1999 Dr. Karl R. Blum, an attending Board-certified orthopedic surgeon, performed a surgical repair of appellant's right patella tendon rupture. By decision dated February 26, 1999, the Office accepted his claim for a right knee tendon rupture. He returned to light duty on May 1, 1999.

description of muscle function; therefore, this method was chosen. [Appellant] was given a grade of 4. It was also noted throughout much of his physical therapy testing, the therapist's gross rating for his muscle strength was 4/5 in his lower right extremity. In addition, some additional objective testing done with the Cybex [strength and endurance testing] evaluation showed approximately a 30 percent deficit in his flexors and approximately a 51 percent deficit in his extensors in the measurement of peak torque. This Cybex evaluation was a follow-up exam[ination] and it actually showed improvement over the first which was much worse. These tests were done after extensive physical therapy. Using Table 17-8 in the [A.M.A., *Guides*, fifth edition], [appellant] had a Grade 4 for both quadriceps and hamstring strength. Each one of these would give a … 12 percent lower extremity impairment. Combining the [12] percent for flexion weakness and [12] percent for extension weakness, this would represent a … 24 percent right lower extremity impairment."

By decision dated December 6, 2004, the Office denied modification of its September 10, 2003 decision.

On March 3, 2005 appellant filed an appeal with the Board. By order dated September 14, 2005, the Board remanded the case for reconstruction and proper assemblage of the case record.

On November 10, 2005 appellant filed a reconsideration request with the Office.

By decision dated January 6, 2006, the Office denied modification of the December 6, 2004 decision.[3]

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing regulation[5] sets 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*[6] has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.[7]

[3] Appellant submitted additional evidence subsequent to the Office decision of January 6, 2006. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] A.M.A., *Guides* (5th ed. 2001); *Joseph Lawrence, Jr.*, 53 ECAB 331 (2002).

[7] 20 C.F.R. § 10.404.

ANALYSIS

In its August 19, 2004 decision, the Board found that the July 28, 2003 report of Dr. Irving Strouse, a Board-certified orthopedic surgeon and an Office referral physician, represented the weight of the medical evidence. Dr. Strouse found that appellant had no permanent impairment causally related to his accepted right patella tendon rupture.

The Board finds that the February 16, 2004 report of Dr. Blum is sufficient to create a conflict with the opinion of Dr. Strouse on the issue of whether appellant has permanent impairment causally related to his accepted right patella tendon rupture. Dr. Blum provided findings on physical examination and addressed the various methods for evaluating lower extremity impairment under the fifth edition of the A.M.A., *Guides.* He noted that the anatomic method of assessment included muscle atrophy and arthritis of the joints. The functional assessment method included range of motion and muscle strength. Regarding the diagnosis-based assessment method, Dr. Blum indicated that appellant's condition was not listed in Table 17-33, so the diagnosis-based assessment method was not applicable. He noted that a number of the anatomic and the functional assessment methods could not be combined according to the Cross-Usage Chart 17-2. Dr. Blum determined that the applicable assessment method that provided the highest lower extremity impairment percentage was loss of muscle strength. Dr. Blum noted that, throughout much of appellant's physical therapy testing, the rating for his muscle strength was 4/5 in his lower right extremity. He indicated that the physical therapy Cybex evaluation for strength and endurance showed approximately a 30 percent deficit in his flexors and approximately a 51 percent deficit in his extensors in the measurement of peak torque. Using Table 17-7 at page 531, Criteria for Grades of Muscle Function of the Lower Extremity, in the A.M.A., *Guides*, fifth edition, Dr. Blum determined that appellant had a Grade 4 for both quadriceps and hamstring strength.[8] Using Table 17-8 at page 532, Impairment Due to Lower Extremity Muscle Weakness, he found that appellant had a 12 percent lower extremity impairment for Grade 4 flexion weakness and 12 percent impairment for Grade 4 extension weakness, which totaled a 24 percent total right lower extremity impairment. The Board finds that Dr. Blum's February 16, 2004 assessment of appellant's right lower extremity impairment, which is based on correct application of the A.M.A., *Guides*, is sufficient to create a conflict with the opinion of Dr. Strouse. Section 8123(a) of the Act 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.[9] Accordingly, the case will be remanded for further development of the medical evidence.

On remand, the Office should refer appellant, together with the case record and statement of accepted facts, to an appropriate Board-certified specialist for an evaluation to resolve the issue of whether appellant has any permanent impairment causally related to his accepted right patella tendon rupture. After such further development as it deems necessary, the Office shall issue an appropriate decision.

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[8] Grade 4 in Table 17-7 is described as "Active movement against gravity with some resistance." A.M.A., *Guides* 531, Table 17-7.

[9] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

CONCLUSION

The Board finds that this case is not in posture for a decision due to a conflict in the medical opinion evidence. Further development of the medical evidence is required.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2006 is set aside and the case is remanded for further development consistent with this decision.

Issued: December 5, 2006
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