United States Department of Labor
Employees' Compensation Appeals Board

W.H., Appellant	)	
and	)	**Docket No. 07-463**
	)	**Issued: July 6, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Trenton, NJ, 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 December 8, 2006 appellant filed a timely appeal from the November 21, 2006 merit decision of the Office of Workers' Compensation Programs, which granted a schedule award for increased impairment. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the schedule award.

ISSUE

The issue is whether appellant has more than a 26 percent permanent impairment of his left lower extremity.

FACTUAL HISTORY

On July 29, 1994 appellant, then a 36-year-old letter carrier, twisted his left knee in the performance of duty: "Walking down steps the left knee gave out and he caught himself before he could fall." The Office accepted his claim for left knee strain and torn medial meniscus and authorized surgical repairs. Appellant received a schedule award for a 13 percent permanent impairment of his left lower extremity.

On the first appeal,[1] the Board remanded the case to the Office for further development of the schedule award issue in light of appellant's January 8, 2002 left knee arthroscopy. On the second appeal,[2] the Board affirmed an Office decision denying an increased schedule award. The Board found that the opinion of the impartial medical specialist was entitled to special weight and established that appellant had no more than a 13 percent permanent impairment of his left lower extremity. On the third appeal,[3] the Board remanded the case for a merit decision on appellant's claim for an increased schedule award. The facts of this case, as set forth in prior Board decisions, are hereby incorporated by reference.

The Office referred appellant's case to an Office medical adviser for review of the July 29, 2004 impairment rating given by Dr. David Weiss, an osteopath, who determined that appellant currently had a 30 percent impairment of his left lower extremity due to muscle weakness and pain.

On November 17, 2006 the Office medical adviser noted that Dr. Weiss had improperly combined a 12 percent impairment for muscle weakness with a 12 percent impairment for another muscle weakness for a combined impairment of 27 percent. The Office medical adviser reported that the combined impairment should instead be 23 percent. Following Dr. Weiss' lead, he increased the impairment for muscle weakness by 3 percent for pain-related impairment, for a final rating of 26 percent.

In a decision dated November 21, 2006, the Office issued a schedule award for a 26 percent permanent impairment of the left lower extremity. On appeal, appellant asks the Board to modify the Office's decision to reflect the 30 percent rating given by Dr. Weiss, rather than the smaller rating approved by the Office.

LEGAL PRECEDENT

Section 8107 of the Federal Employees' Compensation Act[4] authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment. The Office evaluates the degree of permanent impairment according to the standards set forth in the specified edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.[5]

[1] Docket No. 03-911 (issued July 18, 2003).

[2] Docket Nos. 04-342 & 04-464 (issued May 27, 2004).

[3] Docket No. 06-570 (issued September 21, 2006).

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999). Effective February 1, 2001 the Office began using the A.M.A., *Guides* (5th ed. 2001).

ANALYSIS

The only difference between appellant's osteopath, Dr. Weiss, and the reviewing Office medical adviser is how to combine the two impairments for muscle weakness. Grading appellant's muscle function as Grade 4 (active movement against gravity with some resistance),[6] Dr. Weiss determined that appellant had a 12 percent impairment due to weakness in knee flexion and a 12 percent impairment due to weakness in knee extension.[7] He combined these two figures for a 27 percent impairment of the lower extremity. As the examples given in the A.M.A., *Guides* show, multiple impairments are combined, but the Combined Values Chart[8] reveals that a 12 percent impairment combines with a 12 percent impairment for a total of 23 percent, as the Office medical adviser properly reported.

Both Dr. Weiss and the Office medical adviser increased their ratings by three percent to incorporate a pain-related impairment. The Board finds, however, that this is not warranted. Discussing the difficulties associated with integrating pain-related impairment into an impairment rating system, the A.M.A., *Guides* states:

> "Finally, at a practical level, a chapter of the [A.M.A.,] *Guides* devoted to pain-related impairment should not be redundant of or inconsistent with principles impairment rating described in other chapters. The [A.M.A.,] *Guides*' impairment ratings currently include allowances for the pain that individuals typically experience when they suffer from various injuries or diseases, as articulated in Chapter 1 of the [A.M.A.,] *Guides*: 'Physicians recognize the local and distant pain that commonly accompanies many disorders. Impairment ratings in the [A.M.A.,] *Guides* already have accounted for pain. For example, when a cervical spine disorder produces radiating pain down the arm, the arm pain, which is commonly seen, has been accounted for in the cervical spine impairment rating' (p. 10). Thus, if an examining physician determines that an individual has pain-related impairment, he or she will have the additional task of deciding whether or not that impairment has already been adequately incorporated into the rating the person has received on the basis of other chapters of the [A.M.A.,] *Guides*."[9]

Without a sound explanation for incorporating pain-related impairment,[10] Dr. Weiss has not justified a three percent increase to appellant's rating. The Board finds, therefore, that appellant has no more than a 23 percent permanent impairment of his left lower extremity. The Board will modify the Office's November 21, 2006 decision accordingly.

[6] A.M.A., *Guides* 531 (Table 17-7).

[7] *Id*. at 532 (Table 17-8).

[8] *Id*. at 604.

[9] *Id*. at 570.

[10] *See id*. ("When This Chapter Should Be Used to Evaluate Pain-Related Impairment").

CONCLUSION

The Board finds that appellant has less than a 26 percent permanent impairment of his left lower extremity. Dr. Weiss combined two values incorrectly and he did not justify an increase of three percent for pain-related impairment.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2006 decision of the Office of Workers' Compensation Programs is modified to reflect a 23 percent permanent impairment of the left lower extremity and is affirmed as modified.

Issued: July 6, 2007
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