United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
	)	
and	)	**Docket No. 11-795**
	)	**Issued: November 7, 2011**
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:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 7, 2011 appellant filed a timely appeal from the January 31, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his entitlement to schedule award compensation. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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.

[1] 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated October 1, 2010,[2] the Board set aside the October 1 and 9, 2010 schedule award decision of OWCP.[3] The Board found that OWCP properly referred appellant to Dr. George Varghese, a Board-certified physical medicine and rehabilitation physician, for evaluation of his leg impairment due to a conflict in the medical evidence, but determined that his August 11, 2009 impairment evaluation was in need of clarification.[4] In his August 11, 2009 report, Dr. Varghese indicated that, under Table 16-3 of the sixth edition of the A.M.A., *Guides*, the proper diagnostic category was a class 1 partial medial meniscus tear in both knees. With respect to appellant's functional history, he stated that appellant was able to do self-care activities, but his pain and stiffness interfered with some vigorous activities. Using Table 16-6 relating to the 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.[5] For the clinical studies, under Table 16-8, Dr. Varghese gave a grade modifier of two for each leg. He calculated the Net Adjustment Formula and then explained how the result caused movement from the class 1 default value in each leg. For the left leg, Dr. Varghese moved one space to the left from the class 1 default value and, for the right leg, he moved two spaces to the left from the class 1 default value. He concluded that appellant had a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg.

In its October 1, 2010 decision, the Board found that Dr. Varghese did not adequately explain how he reached his determination of the various grade modifiers, namely those for the functional history, physical examination and clinical studies. The Board further indicated that he did not adequately explain whether he factored appellant's arthritis into the calculation of the

[2] Docket Nos. 10-197 & 10-202 (issued October 1, 2010).

[3] OWCP 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. On July 26, 2007 he underwent OWCP-authorized left knee surgery, including a partial medial meniscectomy with debridement of the patella, femoral sulcus and femoral condyles and resection of the medial synovial plica. OWCP 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. It granted him schedule awards for a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg.

[4] The Board also found that an August 15, 2008 impairment rating of Dr. Stephen W. Munns, an attending Board-certified orthopedic surgeon, and December 15, 2008 and January 26, 2009 impairment ratings of Dr. Steven V. Smith, an attending Board-certified orthopedic surgeon, were of little probative value because they were not derived in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*

[5] With respect to the physical examination of 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 (cm). 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 cm.

clinical studies grade modifier.[6] The Board found that Dr. Varghese should he provided an opportunity to clarify his impairment evaluation and remanded the case to OWCP for that purpose.

On remand, OWCP provided Dr. Varghese an opportunity to further explain his August 11, 2009 impairment rating. In a December 22, 2010 report, Dr. Varghese stated that, with respect to functional history under Table 16-6, appellant was able to work as a security guard, although he had some discomfort with running and playing basketball and took one or two Ibuprofen pills per week. He noted that, under Table 16-6, the grade modifier of two was intended for a patient with an antalgic limp or who used an assistive device or brace, so he felt that awarding appellant a grade modifier of two in both legs was "more generous based on his functional activities." With respect to physical examination under Table 16-7, Dr. Varghese indicated that appellant's physical examination in August 2009 did not show any significant abnormalities in terms of stability or ligamental structures. He stated that, based on the history of surgery, he gave a grade modifier of two for the left leg and a grade modifier of one for the right leg. With respect to clinical studies under Table 16-8, Dr. Varghese indicated that he reviewed all the medical reports and diagnostic tests. Magnetic resonance imaging (MRI) scan testing of the right knee showed mild degenerative changes and MRI scan testing of the left knee showed tear of the posterior horn of the medial meniscus, otherwise unremarkable. Dr. Varghese noted that x-rays of the knees showed minimal patellar spurring bilaterally and stated:

> "In the operative report, there were no significant changes in the medial or lateral compartments. Patellofemoral joint showed chondral changes and also medial parapatellar plication which was resected during the surgical procedure. I thought that some of these changes were more age appropriate and the main lesion was the meniscal tears which [were] treated and his residual deficits from that were considered for the rating. These are my explanations for use of the grade modifications which were used for the net adjustment and the final rating using the regional grid."

In a January 17, 2011 report, Dr. Daniel D. Zimmerman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that he had reviewed Dr. Varghese's December 22, 2010 report and found that his medical explanations were excellent in supporting his conclusions regarding the degree of permanent impairment in appellant's legs. He found that no schedule award modifications were warranted.

In a January 31, 2011 decision, OWCP determined that the medical evidence showed that appellant had no 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.

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

LEGAL PRECEDENT

The schedule award provision of FECA[7] and its implementing regulations[8] 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, FECA 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.[9] For OWCP decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* (6th ed. 2009) is used for evaluating permanent impairment.[10]

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 extremity to be rated. With respect to 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.[11] After the Class of Diagnosis (CDX) is determined from the Knee Regional Grid (including identification of a default grade value), the Net Adjustment Formula is applied using the grade modifier for Functional History (GMFH), grade modifier for Physical Examination (GMPE) and grade modifier for Clinical Studies (GMCS). The Net Adjustment Formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[12] 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.[13]

ANALYSIS

In an October 1, 2010 decision, the Board found that Dr. Varghese, a Board-certified physical medicine and rehabilitation physician serving as an OWCP referral physician, did not fully explain his determination that appellant had a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg.[14] The Board found that he did not adequately explain how he reached his determination of the various grade modifiers, namely

[7] 5 U.S.C. § 8107.

[8] 20 C.F.R. § 10.404 (1999).

[9] *Id*.

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

[11] *See* A.M.A., *Guides* (6th ed. 2009) 509-11.

[12] *Id.* at 515-22.

[13] *Id.* at 23-28.

[14] Appellant received schedule awards for a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg, but he claimed entitlement to greater schedule award compensation.

those for the functional history, physical examination and clinical studies. The Board further indicated that Dr. Varghese did not adequately explain whether he factored appellant's arthritis into the calculation of the clinical studies grade modifier. The Board found that he should be provided an opportunity to clarify his impairment evaluation and remanded the case to OWCP for that purpose.

The Board finds that Dr. Varghese provided sufficient supplemental explanation in his December 22, 2010 report to support his grade modifier calculations and to show that appellant has a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg under the standards of the sixth edition of the A.M.A., *Guides*.

In December 22, 2010 report, Dr. Varghese stated that, with respect to functional history under Table 16-6, appellant was able to work as a security guard, although he had some discomfort with running and playing basketball. He noted that, under Table 16-6, the grade modifier of two was intended for a patient with an antalgic limp or who used an assistive device or brace and therefore explained that his awarding of a grade modifier of two in both legs was actually generous.[15] With respect to physical examination under Table 16-7, Dr. Varghese indicated that appellant's physical examination in August 2009 did not show any significant abnormalities in terms of stability or ligamental structures. He explained why he gave a grade modifier of two for the left leg and a grade modifier of one for the right leg by noting that appellant's left leg had findings that required greater surgical intervention.[16] With respect to clinical studies under Table 16-8, counsel has argued on appeal that Dr. Varghese did not adequately consider appellant's arthritis. The Board finds that he did in fact adequately consider this condition in choosing the grade modifier for the clinical studies. Dr. Varghese indicated that he performed a review of the relevant medical evidence and found that diagnostic testing and operative reports showed that appellant had some degree of degenerative changes in his knees, including patellar spurring bilaterally and changes in the medial and lateral compartments bilaterally. His choice of a grade modifier of two for clinical studies is consistent with the evidence of record regarding the arthritis in appellant's knees because, under Table 16-8, a grade modifier of two is appropriate for the case when the cartilage interval is present but is between 25 and 50 percent.[17] The Board notes that Dr. Varghese previously applied the Net Adjustment Formula to these same grade modifiers and properly found that appellant had a four percent permanent impairment of his left leg and a three percent permanent impairment of his right leg.[18]

For these reasons, appellant has not shown 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.

[15] *See* A.M.A., *Guides* 516, Table 16-6.

[16] *See id.* at 517, Table 16-7.

[17] *See id.* at 519, Table 16-78. Prior diagnostic testing showed that appellant had approximately two mm of medial compartment cartilage space that was described as 50 percent of normal.

[18] Moreover, in a January 17, 2011 report, Dr. Zimmerman, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, indicated that he had reviewed Dr. Varghese's December 22, 2010 report and agreed with his detailed assessment.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant did not meet 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.

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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