United States Department of Labor
Employees' Compensation Appeals Board

S.M., Appellant	)	
and	)	**Docket No. 11-596**
	)	**Issued: October 4, 2011**
U.S. POSTAL SERVICE, DELIVERY DISTRIBUTION CENTER, Monsey, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 10, 2011 appellant timely appealed the November 10, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed her left lower extremity schedule award. 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 has greater than 25 percent impairment of the left lower extremity.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, then an 81-year-old retired mail processing clerk, injured her left lower extremity in the performance of duty on December 19, 1997.[2] OWCP initially accepted her claim for closed fracture of the left knee.[3] The claim was later expanded to include left knee post-traumatic osteoarthritis. On May 2, 2001 appellant underwent left total knee replacement, which OWCP authorized. In May 2002, she returned to work in a part-time, limited-duty capacity.[4] Appellant continued to work until voluntarily retiring (nondisability) from federal service effective March 28, 2008.

In a decision dated July 19, 2010, OWCP granted a schedule award for 25 percent impairment of the left lower extremity.[5] It based the award on the April 16, 2010 examination of Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon and OWCP referral physician. The Branch of Hearings and Review subsequently affirmed the 25 percent left lower extremity award.

After filing her schedule award claim Form CA-7 in November 2007, appellant submitted an October 23, 2008 impairment rating from Dr. Douglas S. Holden, a Board-certified orthopedic surgeon, who found 35 percent impairment of the left lower extremity.[6] However, Dr. Holden did not explain the basis for his rating under the then-applicable fifth edition of the A.M.A., *Guides* (2001). He later found 37 percent impairment under the fifth edition of the

[2] Appellant was standing on a chair which tipped over causing her to fall to the floor.

[3] On December 20, 1997 appellant underwent open reduction and internal fixation of the left tibial plateau.

[4] Beginning May 18, 2002, OWCP compensated appellant based on her part-time employment status. It subsequently transferred her to the periodic compensation rolls pursuant to an October 8, 2003 loss of wage-earning capacity determination.

[5] The award covered a period of 78 weeks beginning April 16, 2010. As discussed *infra*, OWCP incorrectly calculated the length of appellant's award.

[6] Appellant initially submitted a January 22, 2008 report that indicated that she was 50 percent impaired pursuant to "New York State guidelines." OWCP subsequently advised her that under FECA she would have to submit an impairment rating under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

A.M.A., *Guides*, but similarly failed to explain the basis for his rating.[7] Effective May 1, 2009, OWCP implemented the sixth edition of the A.M.A., *Guides* (2008). In a report dated June 9, 2009, Dr. Holden found 25 percent impairment of the left lower extremity based on the latest edition of the A.M.A., *Guides* (6th ed. 2008). Once again, he did not explain the basis for his latest impairment rating. Dr. Holden then provided a January 21, 2010 supplemental report identifying at least one section of the A.M.A., *Guides* (6th ed. 2008) he relied upon.[8] His rating also included a component for muscle atrophy and weakness five percent, which he again failed to explain.

After numerous unsuccessful attempts to obtain clarification from appellant's physician, OWCP decided to refer her to Dr. Lakin. Applying the latest edition of the A.M.A., *Guides*, Dr. Lakin found 25 percent left lower extremity impairment based on appellant's May 2001 left total knee replacement. Under Table 16-3, Knee Regional Grid, he found a class 2 impairment, which represented a moderate problem.[9] A total knee replacement with a "Good" result represented a range of impairment from 21 to 25 percent, with the default grade "C" representing 25 percent lower extremity impairment.[10] Dr. Lakin explained that appellant had stability and function, but she had some difficulty with prolonged walking and some difficulty with stairs. There was also evidence of some decreased range of motion and decreased strength. Dr. Lakin indicated that appellant had grade 2 modifiers for functional history and physical examination, but no adjustment for clinical studies because x-rays had not been submitted for review.[11] Because the net adjustment for the identified grade modifiers was zero, the default grade "C" or 25 percent represented the extent of appellant's left lower extremity impairment. According to Dr. Lakin, appellant reached MMI on October 23, 2008.

On June 5, 2010 the DMA reviewed Dr. Lakin's report and concurred with his finding of 25 percent impairment of the left lower extremity. Accordingly, OWCP based its July 19, 2010

[7] Following receipt of Dr. Holden's October 23, 2008 impairment rating (35 percent), OWCP referred the case to its district medical adviser (DMA) who calculated 37 percent left lower extremity impairment based on the results of appellant's May 2001 left knee replacement surgery. It then forwarded a copy of the DMA's November 17, 2008 report to Dr. Holden for comment. Dr. Holden's December 17, 2008 response, which OWCP did not receive until early-February 2009, indicated that there was "an additional impairment of function due to weakness, atrophy, pain and/or discomfort estimated at [five percent] of the lower extremity." He concluded that appellant reached maximum medical improvement (MMI) as of January 22, 2008 and that she had a left lower extremity impairment of 37 percent. However, Dr. Holden did not explain how his rating changed from 35 to 37 percent. He also failed to explain how he apparently incorporated an additional five percent impairment for atrophy, weakness, pain and/or discomfort. The case was returned to the DMA, who recommended an award of 37 percent with an October 23, 2008 date of MMI. Given that Dr. Holden identified January 22, 2008 as the date of MMI, OWCP sought clarification from the DMA regarding the appropriate date of MMI. On April 24, 2009 the DMA reiterated his belief that October 23, 2008 was the date of MMI, thus disagreeing with appellant's physician. Assuming, *arguendo*, that OWCP was satisfied with the DMA's latest report, it had less than a week to issue an appropriate decision prior to the expiration of the fifth edition of the A.M.A., *Guides*.

[8] Dr. Holden referenced Table 16-3, Knee Regional Grid, A.M.A., *Guides* 511.

[9] A.M.A., *Guides* 511.

[10] *Id.*

[11] *See* Table 16-5, Table 16-6, Table 16-7 and Table 16-8, A.M.A., *Guides* 515-20.

award on the latest information provided by Dr. Lakin and the DMA. By decision dated November 10, 2010, the Branch of Hearings and Review affirmed the July 19, 2010 schedule award.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.[12] FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[13] Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2008).[14]

ANALYSIS

Appellant believed OWCP should have awarded her 37 percent impairment of the left lower extremity. She essentially argued that, but for the adoption of the sixth edition of the A.M.A., *Guides* (2008), she would have been entitled to a greater award than the 25 percent she received. Appellant bears the burden of establishing entitlement to a schedule award.[15] Dr. Holden's various reports were insufficient to establish entitlement under either the fifth or sixth edition of the A.M.A., *Guides*. He consistently failed to explain how he arrived at his left lower extremity impairment rating. OWCP went to great lengths to assist appellant in obtaining a rationalized medical opinion regarding the extent of her lower extremity impairment.

[12] For a total loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

[13] 20 C.F.R. § 10.404 (2010).

[14] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); *see also* Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.6a (January 2010).

[15] While appellant has the burden of establishing the extent of impairment due to an accepted injury, OWCP shares responsibility in the development of the medical evidence. *D.N.*, 59 ECAB 576, 580 (2008).

Unfortunately, suitable evidence was not secured until after the effective date of the sixth edition of the A.M.A., *Guides* (2008).[16] Once the May 1, 2009 effective date had passed, OWCP was obligated to adjudicate appellant's schedule award claim under the latest edition of the A.M.A., *Guides*.[17]

In *Harry D. Butler*,[18] the Board noted that Congress delegated authority to the Director regarding the specific methods by which permanent impairment is to be rated. Pursuant to this authority, the Director adopted the A.M.A., *Guides* as a uniform standard applicable to all claimants and the Board has concurred in the adoption.[19] On March 15, 2009 the Director exercised authority to advise that as of May 1, 2009 all schedule award decisions of OWCP should reflect use of the sixth edition of the A.M.A., *Guides*.[20] The applicable date of the sixth edition is as of the schedule award decision reached. It is not determined by either the date of MMI or when the claim for such award was filed.

Lower extremity impairment is covered by Chapter 16 of the A.M.A., *Guides* (6th ed. 2008). Dr. Lakin rated appellant based on the result of her May 2001 left total knee replacement surgery. Total knee replacements are addressed under Table 16-3, Knee Regional Grid -- Lower Extremity Impairments (LEI).[21] A "Good" result has a range of impairment of 21 to 25 percent, a "Fair" result has a range of 31 to 43 percent, and a "Poor" result has a range of 59 to 83 percent.[22] Dr. Lakin found appellant had a "Good" result, which represents a class 2 impairment (CDX). A "Good" result is defined as "good position, stable, functional." In his April 16, 2010 report, Dr. Lakin noted that appellant had stability and function, but some difficulty with prolonged walking and some difficulty with stairs. He also noted evidence of some decreased range of motion and decreased strength. A total knee replacement with a "Good" result represents a range of impairment of 21 to 25 percent. The default rating or grade "C" is 25 percent.

After determining the impairment class and default grade, the next step in the process is to determine if there are any applicable grade adjustments for so-called "nonkey" factors or

[16] Appellant argued there was evidence she had 37 percent impairment under the A.M.A., *Guides* (5th ed. 2003) as early as November 17, 2008, and thus, OWCP had ample time to issue a decision prior to the May 1, 2009 implementation of the sixth edition of the A.M.A., *Guides*. The DMA's November 17, 2008 impairment rating, which appellant referred to, was not thoroughly vetted until the end of April 2009, and even then there was an unresolved issue as to the appropriate date of MMI.

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7b(4).

[18] 43 ECAB 859 (1992).

[19] *Id*. at 866.

[20] FECA Bulletin No. 09-03 (March 15, 2009). The FECA Bulletin was incorporated in the Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award & Permanent Disability Claim*, Chapter 2.808.6(a) (January 2010).

[21] A.M.A., *Guides* 511.

[22] *Id.*

modifiers. These include adjustments for Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS). The grade modifiers are used in the net adjustment formula to calculate a net adjustment.[23] The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment. Dr. Lakin found a grade 2 modifier for both GMFH and GMPE.[24] Applying the net adjustment formula resulted in no adjustment from the default grade of C.[25] Accordingly, Dr. Lakin found 25 percent impairment of the left lower extremity. The DMA subsequently concurred.

The Board finds that Dr. Lakin's April 16, 2010 impairment rating conforms to the A.M.A., *Guides* (6th ed. 2008), and thus, represent the weight of the medical evidence regarding the extent of appellant's left lower extremity impairment. Appellant has not submitted any credible medical evidence indicating she has greater than 25 percent impairment of the left lower extremity.

The Board further notes that OWCP miscalculated the number of weeks of compensation appellant is entitled to based on her 25 percent lower extremity impairment. Rather than 78 weeks as noted in the July 19, 2010 schedule award, appellant is only entitled to 72 weeks compensation.[26] Accordingly, the November 10, 2010 decision is modified to reflect entitlement to 72 weeks' compensation.

CONCLUSION

Appellant failed to establish that she has greater than 25 percent impairment of the left lower extremity.

[23] Net Adjustment = GMFH -- CDX + GMPE -- CDX + GMCS -- CDX. Section 15.3d, A.M.A., *Guides* 411.

[24] Dr. Lakin did not include clinical studies in the analysis because no x-rays were submitted for his review.

[25] Net Adjustment zero = GMFH (2) -- CDX (2) + GMPE (2) -- CDX (2) + GMCS (n/a -- CDX (n/a).

[26] The maximum period allowed for total loss of use of a leg is 288 weeks. 5 U.S.C. § 8107(c)(2). Appellant has a 25 percent loss; therefore, she is entitled to 72 weeks' compensation (288 weeks x .25 = 72). OWCP's calculation of 78 weeks appears to have been mistakenly based on the maximum period allowed for total loss of use of an arm -- 312 weeks (312 weeks x .25 = 78). 5 U.S.C. § 8107(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2010 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: October 4, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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