United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant	)	
and	)	**Docket No. 12-1654**
	)	**Issued: April 4, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Teterboro, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 23, 2012 appellant, through his attorney, filed a timely appeal from January 30 and June 26, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP) granting him a schedule award. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 a one percent permanent impairment of the left lower extremity or any impairment of another extremity.

FACTUAL HISTORY

On July 15, 2003 appellant, then a 54-year-old mail processor, filed a traumatic injury claim alleging that on that date he injured his left elbow, left knee and lower back in the

[1] 5 U.S.C. § 8101 *et seq.*

performance of duty. OWCP accepted the claim for a left elbow contusion, a left knee contusion, lumbar sprain and an aggravation of cervical degenerative disc disease.[2]

In an impairment evaluation dated November 24, 2010, Dr. Arthur Becan, an orthopedic surgeon, discussed appellant's July 15, 2003 employment injury and noted that he had a history of left knee arthroscopy in 2002. He diagnosed chronic post-traumatic cervical and lumbosacral strain/sprain, an aggravation of preexisting osteoarthritis and herniated discs at C4-5, C5-6 and C6-7. On examination of the left knee, Dr. Becan noted that a magnetic resonance imaging (MRI) scan study of the left knee revealed a partial tear of the anterior cruciate ligament, a complex tear of the medial meniscus and lateral meniscus and a probable partial posterior cruciate ligament tear. Citing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*), he found that appellant had a 9 percent impairment of the left upper extremity due to loss of motor strength of the left deltoid, a 4 percent impairment due to a sensory deficit of the left radial distribution and a 1 percent impairment due to medial epicondylitis of the left elbow, for a total left upper extremity impairment of 14 percent. Dr. Becan further found a one percent right upper extremity impairment as a result of a sensory deficit in the right radial distribution. For the left lower extremity, he opined that appellant had a 12 percent impairment for a sensory deficit of the left L5 nerve root and a 10 percent impairment of the left knee due to medial and lateral meniscal tears, for a 23 percent total impairment. Dr. Becan further found a four percent impairment of the right lower extremity for a sensory deficit of the right L5 nerve root.

On March 25, 2011 appellant filed a claim for a schedule award. On July 10, 2011 an OWCP medical adviser reviewed Dr. Becan's report and noted that OWCP had not accepted any conditions of the right upper and lower extremity. He thus found that the evidence did not warrant a right upper or lower extremity impairment rating. The medical adviser opined that appellant had a one percent impairment due to his left elbow contusion and a three percent impairment due to his left knee contusion and internal derangement.

On August 26, 2011 OWCP referred appellant to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, to resolve a conflict in opinion between Dr. Becan and the medical adviser. In a report dated September 27, 2011, Dr. Rubinfeld discussed the history of injury and appellant's current complaints of pain in his neck, back, left arm, left wrist and left knee and numbness in the bilateral elbows, fingers and left thigh. He measured normal range of motion of the bilateral shoulders, elbows, wrists, hands, hips, ankles, feet, spine and right knee. For the left knee, Dr. Rubinfeld measured range of motion from 0 to 105 degrees with no instability or laxity but pain with motion and generalized tenderness. He found normal motor strength and deep tendon reflexes in the upper and lower extremities with no atrophy in the legs. Dr. Rubinfeld noted decreased sensation of the "right posterior thigh, left small finger and right and left great toes." He agreed with the opinion of the medical adviser regarding the extent of permanent impairment.

[2] By decision dated April 11, 2007, OWCP found that appellant had no loss of wage-earning capacity based on its determination that his actual earnings effective September 18, 2006 fairly and reasonably represented his wage-earning capacity.

By letter dated November 29, 2011, OWCP requested that Dr. Rubinfeld provide the calculations he used in determining the extent of permanent impairment. In a December 12, 2011 response, Dr. Rubinfeld asserted that appellant had no objective findings showing a left elbow impairment or any impairment of the cervical or lumbar spine. He noted that OWCP had not accepted any lumbar disc herniation or radiculopathy and that a lumbar sprain would "not result in sensory loss." Dr. Rubinfeld advised that appellant had a one percent permanent impairment of the left knee using Table 16-3 on page 509 of the sixth edition of the A.M.A., *Guides*. He indicated that it was not clear why Dr. Becan[3] found a 10 percent left lower extremity impairment or additions for sensory loss and radiculopathy.

On January 4, 2012 an OWCP medical adviser reviewed Dr. Rubinfeld's report and concurred with his findings. By decision dated January 30, 2012, OWCP granted appellant a schedule award for a one percent permanent impairment of the left lower extremity. The period of the award ran for 2.88 weeks from November 24 to December 14, 2010.

On February 3, 2012 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative. At the telephone hearing, held on May 8, 2012, his attorney argued that Dr. Rubinfeld was not a referee physician as an OWCP medical adviser could not create a conflict in evidence. Counsel also asserted that Dr. Rubinfeld could not act as a referee physician as he provided second opinion examinations for OWCP.

In a letter dated May 11, 2012, appellant's attorney again contended that the medical adviser's opinion could not create a conflict in evidence as he did not conduct an examination. He also argued that OWCP bypassed Dr. Stephen Lasser, a Board-certified orthopedic surgeon.[4] Counsel noted that a prior referral physician in 2003 found symptoms of cervical radiculopathy.

By decision dated June 26, 2012, OWCP's hearing representative affirmed the January 30, 2012 decision. She discussed appellant's history of nonemployment-related left knee surgery on June 11, 2002 and his 2008 occupational disease claim, accepted for derangement of the left knee under file number xxxxxx735. The hearing representative noted that appellant had submitted Dr. Becan's November 24, 2010 report and had previously requested a schedule award under file number xxxxxx735. She found that Dr. Rubinfeld's opinion represented the weight of the evidence and established that appellant had no more than a one percent left lower extremity impairment as a result of his 2003 employment injury and no impairment of another extremity. The hearing representative advised appellant to pursue a decision on the extent of his left knee impairment under file number xxxxxx735.

On appeal, appellant's attorney argues that OWCP's medical adviser's report was insufficient to create a conflict in evidence and that Dr. Rubinfeld could not act as a referee physician as he provided second opinion examinations for OWCP. He indicated that reports showed that appellant had radiculopathy of the upper extremities and bilateral carpal tunnel syndrome and ulnar neuropathy.

[3] Dr. Rubinfeld referred to Dr. Becan by another physician's name.

[4] The record contains screen shots showing that OWCP bypassed Dr. Lasser, a Board-certified orthopedic surgeon, as impartial medical examiner as he did not accept OWCP patients.

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing federal regulations,[6] 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 for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[7] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[8]

Section 8123(a) of FECA 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] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

OWCP's procedures provide as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[11]

ANALYSIS

In a report dated November 24, 2010, Dr. Becan found that appellant had a 12 percent left lower extremity impairment due to a sensory deficit of the left L5 nerve root and a 10 percent left lower extremity impairment due to medial and lateral meniscal tears of the left knee, for a total left lower extremity impairment of 23 percent. An OWCP medical adviser reviewed Dr. Becan's finding and opined that appellant had a three percent permanent impairment of the

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404.

[7] *Id*. at § 10.404(a).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6.6a (January 2010); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

[9] 5 U.S.C. § 8123(a).

[10] *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[11] *Supra* note 8 at Chapter 3.600(3) (October 1990).

left lower extremity due to his left knee contusion and internal derangement. OWCP determined that a conflict existed between Dr. Becan and an OWCP medical adviser and referred appellant to Dr. Rubinfeld for an impartial medical examination. Counsel argued that Dr. Rubinfeld had not been properly selected because Dr. Lasser had been improperly bypassed. The record reflects, however, that Dr. Lasser was bypassed as he did not accept OWCP patients. Counsel further argued that Dr. Rubinfeld could not serve as an impartial medical examiner if he had previously been used by OWCP as a second opinion physician. OWCP procedure manual reflects, through, that OWCP is not precluded from using physicians as independent medical examiners, who have previously served as second opinion physicians.[12] The SOAF provided to Dr. Rubinfeld indicated that OWCP had accepted appellant's claim for a left elbow contusion, left knee contusion, lumbar sprain and an aggravation of cervical degenerative disc disease. In the June 26, 2012 decision, the hearing representative noted that appellant had an accepted occupational disease claim for internal derangement of the left knee under file number xxxxxx735. She further indicated that appellant had submitted Dr. Becan's report and had requested a schedule award under file number xxxxxx735. The hearing representative informed appellant that he could pursue a schedule award under that file number for his knee condition. She concluded that Dr. Rubinfeld's opinion represented the weight of the evidence and established that he had no more than a one percent permanent impairment of the left knee and no impairment of any other extremity. The SOAF provided to Dr. Rubinfeld, however, did not include appellant's accepted internal derangement of the left knee under file number xxxxxx735. OWCP's procedures indicate that accepted conditions must be included in the SOAF and further provide that when an OWCP medical adviser, second opinion specialist or referee physician "renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[13] Dr. Rubinfeld, as the impartial medical examiner selected to resolve a conflict regarding the extent of permanent impairment, should have based his medical opinion on a complete SOAF that included the accepted condition of derangement of the left knee under file number xxxxxx735. Since he rendered his opinion based on incomplete factual information, his report is of limited probative value.[14] Accordingly, the Board finds that the case must be remanded for further medical development as Dr. Rubinfeld's opinion is of diminished probative value as it was based on an incomplete SOAF.[15] After such further development as deemed necessary, OWCP should issue a *de novo* decision regarding whether appellant is entitled to a schedule award as a result of his employment injury.

CONCLUSION

The Board finds that the case is not in posture for decision.

[12] *Supra* note 8 at Chapter 3.500(4)(b)(3) (July 2011).

[13] *See supra* note 10.

[14] *See Daniel J. Raske*, Docket No. 04-1543 (issued February 11, 2005).

[15] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the June 26 and January 30, 2012 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 4, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board