United States Department of Labor
Employees' Compensation Appeals Board

E.A., Appellant	)	
	)	
and	)	**Docket No. 13-550**
	)	**Issued: May 10, 2013**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT COMMAND, White Sands, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 8, 2013 appellant filed a timely appeal from the July 12, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he has more than a seven percent permanent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

OWCP accepted that on November 16, 2010 appellant, then a 55-year-old water and waste systems mechanic, sustained a lumbar sprain, internal derangement of his right knee and

[1] 5 U.S.C. §§ 8101-8193.

old bucket handle tear of the medial meniscus of his right knee due to a slip and fall at work. On May 3, 2011 Dr. Andrew Palafox, an attending Board-certified orthopedic surgeon, performed partial medial and lateral meniscectomies on appellant's right knee. The surgical procedures were authorized by OWCP as necessary due to the November 16, 2010 work injury.

On July 28, 2011 appellant underwent a functional capacity evaluation which found that he could work with limitations. Dr. Palafox reviewed the evaluation and released appellant to return to work with limitations on August 15, 2011. He continued to treat appellant on an intermittent basis and documented his lumbar and right knee complaints and a diagnosis of internal derangement of the right knee. Appellant participated in a work-hardening program which was reported to have contributed to a significant improvement in his right knee condition. He underwent another functional capacity evaluation which found that he was capable of performing heavy work and recommended that he return to his regular duty. Dr. Palafox released appellant to return to full-duty work on December 15, 2011.

In a January 11, 2012 report, Dr. Palafox described the findings of his examination of appellant on that date. He indicated that appellant was doing much better and noted that he had a good range of motion with good strength of his right knee.

In a March 7, 2012 report, Dr. Palafox provided a history of appellant's right knee condition and reported the findings of an examination conducted on that date. He noted that appellant had full range of right knee motion and had no major crepitus or swelling in his right knee. Appellant exhibited slight tenderness in his right knee. Dr. Palafox indicated that he was assessing appellant's right knee impairment under the standards of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009). With respect to functional history, he noted that appellant was able to ambulate long distances without major issues. Dr. Palafox indicated that no clinical studies were performed after appellant's right knee surgery and stated, "Using the [sixth edition of the A.M.A., *Guides*] on page 509 at the bottom of the page, meniscal injury, partial medial and lateral default grade C, class 1 injury, mild problem, is a 10 percent lower extremity impairment, with applying the adjustment grid, the 10 percent does not change. The final lower extremity impairment for this injury would be 10 percent using the [A.M.A., *Guides*]." Dr. Palafox attached an impairment worksheet in which he indicated that appellant had a grade modifier for functional history of one and a grade modifier for physical examination of one. He stated that a grade modifier for clinical studies was not applicable in appellant's case.[2]

On March 28, 2012 appellant filed a claim for a schedule award due to his accepted work injuries.

On March 29, 2012 Dr. Morley Slutsky, a Board-certified occupational medicine physician serving as an OWCP medical adviser, reviewed the medical evidence of record, including the March 7, 2012 report of Dr. Palafox. As to right leg impairment, he concluded that appellant had a seven percent permanent impairment under the sixth edition of the A.M.A., *Guides*. Dr. Slutsky agreed with the diagnosis and class used by Dr. Palafox (under Table 16-3, Knee Regional Grid, of the sixth edition of the A.M.A., *Guides*), but disagreed with how

[2] Dr. Palafox also indicated that appellant had a 10 percent impairment of his whole person.

Dr. Palafox assigned values for functional history and physical examination modifiers. He noted that appellant had a normal physical examination and posited that he did not meet the criteria for a grade modifier one for either functional history or physical examination. Dr. Slutsky stated, "As such the final net adjustment [is] calculated to be -2, final grade is A and final impairment is 7 percent [lower extremity impairment] as opposed to a final net adjustment of 0, final grade of C and final impairment of 10 percent [lower extremity impairment] which Dr. Palafox assigned." He indicated that appellant reached maximum medical improvement on March 7, 2012, the date of the rating examination by Dr. Palafox.

In a March 29, 2012 report, Dr. Slutsky clarified his report. He advised that appellant had a grade modifier for functional history of zero (rather than one) because Dr. Palafox's report did not document that he had an antalgic gait (in the presence of objectively defined, significant pathology) with asymmetric shortened stance, stable with the use of an external orthotic device, routine use of a single gait aid (cane or crutch) or positive Trendelenburg's test.[3] He also stated that appellant had a grade modifier for physical examination of zero (rather than one) because Dr. Palafox had documented only one motion per joint movement, a practice not consistent with the validity criteria for range of motion measurements. Under section 16.3b on page 517 of the sixth edition of the A.M.A., *Guides,* three active range of motion measurements should be obtained with the maximum observed measurement being used for impairment calculation purposes.[4] He stated that a grade modifier for clinical studies was not applicable in appellant's case, according to section 16.3 on page 518, because there were no clinical studies taken at the time of maximum medical improvement. Applying these grade modifier values to the net adjustment formula yielded a value of negative two and, therefore, moving two values to the left of the grade C default value on Table 16-3 was warranted. Dr. Slutsky noted that this calculation yielded a total right leg impairment of seven percent.

In an April 3, 2012 decision, OWCP granted appellant a schedule award for a seven percent permanent impairment of his right leg. The award ran from March 7 to July 26, 2012 and was based on the March 29, 2012 impairment rating of Dr. Slutsky.

In an April 4, 2012 report, Dr. Palafox clarified that appellant had 10 percent impairment of his right lower extremity rather than a 10 percent impairment of his whole person. He noted in an April 18, 2012 report that OWCP was changing his grade modifiers and indicated that appellant was contesting this assessment. Dr. Palafox did not provide any additional discussion about how he utilized the grade modifiers in appellant's case.

Appellant requested a review of the written record by an OWCP hearing representative. In a July 12, 2012 decision, the hearing representative affirmed the April 3, 2012 decision, finding that the weight of the medical evidence regarding appellant's right leg impairment rested with the March 29, 2012 impairment rating by Dr. Slutsky. She indicated that the March 7, 2012 impairment rating of Dr. Palafox was not well rationalized.

[3] Dr. Slutsky referenced Table 16-6 on page 516 of the sixth edition of the A.M.A., *Guides.*

[4] Dr. Slutsky also referenced Table 16-7 on page 517 of the sixth edition of the A.M.A., *Guides.*

LEGAL PRECEDENT

The schedule award provision of FECA[5] and its implementing 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 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.[7] 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.[8]

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.[9] 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).[10] 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.[11]

ANALYSIS

OWCP accepted that on November 16, 2010 appellant sustained a lumbar sprain, internal derangement of his right knee and old bucket handle right tear of the medial meniscus of his right knee due to a slip and fall at work. On May 3, 2011 Dr. Palafox, an attending Board-certified orthopedic surgeon, performed partial medial and lateral meniscectomies on appellant's right knee. The surgical procedures were authorized by OWCP as necessary due to the November 16, 2010 work injury.

[5] 5 U.S.C. § 8107.

[6] 20 C.F.R. § 10.404 (1999).

[7] *Id*.

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

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

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

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

OWCP granted appellant a schedule for a seven percent permanent impairment of his right leg. The award was based on the March 29, 2012 impairment rating of Dr. Slutsky, a Board-certified occupational physician serving as an OWCP medical adviser, who had reviewed the medical evidence of record, including the March 7, 2012 report of Dr. Palafox.

The Board finds that Dr. Slutsky properly applied the standards of the sixth edition of the A.M.A., *Guides* to find that appellant had a seven percent impairment of his right leg.

In his March 29, 2012 report, Dr. Slutsky correctly applied Table 16-3 on page 509 of the sixth edition of the A.M.A., *Guides* to find that, due to his partial medial and lateral meniscectomies, appellant fell under the diagnosis-based class 1 default value of 10 percent.[12] He also correctly noted that appellant had a normal physical examination and posited that he did not meet the criteria for a grade modifier for either functional history or physical examination based on the condition of his knee. Dr. Slutsky further correctly found that a grade modifier for clinical studies was not applicable, according to Section 16.3 on page 518, because there were no clinical studies taken at the time of maximum medical improvement. Applying these grade modifier values to the net adjustment formula yielded a value of negative two and, therefore, moving two values to the left of the grade C default value on Table 16-3 was warranted.[13] Dr. Slutsky correctly concluded that this calculation yielded a total right leg impairment of seven percent.

On appeal, appellant argued that the March 7, 2012 report of Dr. Palafox showed that he has 10 percent permanent impairment of his right leg. However, Dr. Palafox failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses.[14] Dr. Palafox found class 1 default value of 10 percent on Table 16-6 for the anterior cruciate ligament but provided no rationalized explanation on the specific standards of the sixth edition of the A.M.A., *Guides*, either in his March 7, 2012 report or two brief reports produced in April 2012.

For these reasons, appellant has not shown that he has more than a seven percent permanent impairment of his right knee and OWCP properly denied his claim for additional schedule award compensation.

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.

[12] A.M.A., *Guides* 509, Table 16-3. Dr. Slutsky indicated that appellant reached maximum medical improvement on March 7, 2012, the date of the rating examination by Dr. Palafox.

[13] GMFH-CDX = 0-1 = -1; GMPE-CDX = 0-1 = -1; GMCS-CDX (not applicable). Total net adjustment formula yielded -2.

[14] *See James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion which is not based upon the standards adopted by OWCP and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a seven percent permanent impairment of his right leg, for which he received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board