United States Department of Labor
Employees' Compensation Appeals Board

B.G., Appellant	)	
and	)	**Docket No. 14-76**
	)	**Issued: April 16, 2014**
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, DETENTION & REMOVAL OPERATION, Newark, NJ, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 7, 2013 appellant filed a timely appeal from schedule award decisions of the Office of Workers' Compensation Programs (OWCP) dated June 5 and September 24, 2013. 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 schedule award decisions.

ISSUE

The issue is whether appellant met his burden of proof to establish more than 10 percent impairment of the left leg for which he received schedule awards.

On appeal, appellant generally asserts that he has greater impairment.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On February 6, 2008 appellant, then a 39-year-old enforcement agent, injured his right and left knees and left ankle while apprehending a fugitive who aggressively resisted arrest. He stopped work that day. February 13, 2008 x-rays of both knees demonstrated osteoarthritis. A February 20, 2008 magnetic resonance imaging (MRI) scan of the left knee demonstrated a suspected joint space loose body, tricompartment osteoarthritic changes, a complex tear of the lateral meniscus and a previous repair of the anterior cruciate ligament with findings suspicious of re-tear. OWCP accepted that appellant sustained aggravation of a preexisting tear of the left knee, medial meniscus, a left ankle sprain, derangement of the left lateral meniscus and toxic effect of other substances. On April 9, 2008 appellant underwent arthroscopic partial medial and lateral meniscectomies of the left knee and removal of the loose bodies. He was placed on the periodic compensation rolls. Appellant returned to regular duty on September 8, 2008.

On May 5, 2010 appellant was granted a schedule award for eight percent impairment of the left lower extremity.[2] On December 20, 2012 he filed a claim for an additional schedule award. In a January 9, 2013 report, Dr. Mark A. Cohen, an orthopedic surgeon, noted seeing appellant two years previously. Appellant had no further knee injury. Dr. Cohen found tenderness on examination along the medial and lateral joint line with no varus, valgus or laxity of the knee. A left knee x-ray demonstrated bone-on-bone opposition of the medial compartment with osteophyte and advanced patellofemoral degenerative changes and screws from a previous anterior cruciate ligament reconstruction. Dr. Cohen diagnosed advanced medial compartmental arthritis and patellofemoral arthritis of the left knee.

In February 2013, OWCP referred appellant to Dr. Emily Hoff-Sullivan, a Board-certified orthopedic surgeon, for a second opinion evaluation and impairment rating. In a March 11, 2013 report, Dr. Hoff-Sullivan reviewed a history of injury, appellant's past medical treatment, which included a left foot fracture in 1990 and the medical records. A February 5, 2013 x-ray of both knees revealed severe degenerative changes with marginal osteophyte formation and a one-millimeter joint interval of the medial and patellofemoral compartments. Dr. Hoff-Sullivan described complaints of increased pain and swelling in the left knee and indicated that appellant had an asymmetric, antalgic gait and used a cane and walking boot to aid in ambulation. Left knee examination demonstrated mild effusion and tenderness to palpation of the medial and lateral joint lines with palpable osteophytes and marked crepitus with range of motion. Apley's test was strongly positive. Left ankle examination revealed no swelling, asymmetry with tenderness across the tibiotalar joint. Both lower extremities had normal deep tendon reflexes at the knees and ankles and motor strength was 5/5 bilaterally. Dr. Hoff-Sullivan rated appellant's left lower extremity impairment in accordance with the sixth edition of the A.M.A., *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*).[3] She noted that his left ankle strain was resolved and was noncontributory. Appellant's left knee arthritic condition had advanced with near obliteration of the joint interval, as shown on

[2] The percentage of impairment was based on the March 3, 2010 report of Dr. Stuart L. Trager, a Board-certified orthopedic surgeon and OWCP referral physician, and the April 18, 2010 report of OWCP's medical adviser, who agreed that appellant had an eight percent left lower extremity due to a primary diagnosis of left knee osteoarthritis.

[3] A.M.A., *Guides* (6th ed. 2008).

the February 5, 2013 x-ray. Dr. Hoff-Sullivan advised that, in accordance with Table 16-3, Knee Regional Grid, appellant had a class 3 impairment due to primary knee joint arthritis, based on a one-millimeter joint space narrowing shown on the February 5, 2013 x-ray. She found a grade modifier of 2 for Functional History (GMFH) because appellant had an antalgic limp with an asymmetric shortened stance and walked with a cane. Dr. Hoff-Sullivan found a grade modifier of 2 for Physical Examination (GMPE) due to knee effusion and palpable osteophytes with decreased knee range of motion. She applied the net adjustment formula to find that appellant had 26 percent left lower extremity impairment.

On April 29, 2013 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical records. He disagreed with Dr. Hoff-Sullivan's rating of 26 percent left lower extremity impairment as she based it on an incorrect diagnosis. Dr. Berman stated, "the arthritic changes were clearly preexisting and were not aggravated by this injury. Therefore, the diagnosis of arthritis of the knee joint cannot be utilized for this calculation." Dr. Berman advised that, for the accepted conditions of left medial and lateral meniscal tears, under Table 16-3, the default value was 10 percent. He concluded that appellant had a 10 percent left leg impairment.

In a May 9, 2013 memorandum, the claim examiner noted that the Board had held that in determining the amount of a schedule award, preexisting impairments of a scheduled member were to be included. Dr. Berman was asked to reconsider Dr. Hoff-Sullivan's March 11, 2013 report and to amend the impairment rating, considering all diagnosed conditions of appellant's left lower extremity, including arthritis. In a May 27, 2013 report, he again stated that it was "inappropriate" to provide an impairment rating for arthritis as appellant had this prior to the employment injury. Dr. Berman reiterated that appellant had 10 percent left lower extremity impairment.

On June 5, 2013 OWCP granted appellant a schedule award for an additional two percent left lower extremity impairment, for a total of 5.76 weeks, to run from March 11 to April 20, 2013. It found the weight of the medical opinion rested with Dr. Berman, who concluded that it would be inappropriate to base an impairment rating on appellant's preexisting left knee arthritis.

Appellant timely requested a review of the written record. In a September 24, 2013 decision, OWCP's hearing representative found that OWCP correctly calculated appellant's additional schedule award, based on the opinion of OWCP's medical adviser.

LEGAL PRECEDENT

The schedule award provision of FECA[4] and its implementing federal regulations[5] 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

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

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.[6] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

The sixth edition of the A.M.A., *Guides* provides a diagnosis-based method of evaluation utilizing the World Health Organization's International Classification of Functioning, Disability and Health (ICF).[9] Under the sixth edition, for lower extremity impairments the evaluator identifies the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on GMFH, GMPE and Clinical Studies (GMCS).[10] The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).[11] 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.[12]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to an OWCP medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[13]

It is well established that in determining entitlement to a schedule award, preexisting impairment to the scheduled member is to be included.[14] There are no provisions for apportionment under FECA. Rated impairment should reflect the total loss as evaluated for the schedule member at the time of the rating examination.[15]

ANALYSIS

The Board finds this case is not in posture for decision regarding appellant's left lower extremity impairment. The Board has long held in determining entitlement to a schedule award,

[6] *Id*. at § 10.404(a).

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009).

[9] A.M.A., *Guides*, *supra* note 3 at 4, section 1.3, "The International Classification of Functioning, Disability and Health (ICF): A Contemporary Model of Disablement."

[10] *Id*. at 494-531.

[11] *Id*. at 521.

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

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[14] *Peter C. Belkind*, 56 ECAB 580 (2005).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d (February 2013).

preexisting impairment to the scheduled member is to be included.[16] The accepted conditions in this case are left medial and lateral meniscal tears. On May 5, 2010 appellant was granted a schedule award for an eight percent left lower extremity impairment, based on a primary diagnosis of left knee arthritis, a preexisting condition.[17] A left knee x-ray obtained on February 13, 2008, shortly after the February 6, 2008 employment injury, demonstrated osteoarthritis. A February 20, 2008 MRI scan study of the left knee demonstrated tricompartment osteoarthritic changes. In a March 11, 2013 report, Dr. Hoff-Sullivan, an OWCP referral physician, noted her review of the February 5, 2013 left knee x-ray that demonstrated severe degenerative changes and a one-millimeter joint interval of the medial and patellofemoral compartments.[18] She advised that left knee arthritis had advanced since the 2008 injury. Dr. Hoff-Sullivan concluded that appellant had 26 percent left lower extremity impairment based on a diagnosis of class 3 primary knee joint arthritis. Dr. Berman improperly declined to consider the preexisting arthritis condition, asserting that it would be "inappropriate" to consider it.[19] The record clearly establishes that appellant had preexisting left knee joint arthritis, which should have considered in determining the extent of impairment.[20]

Table 16-3, Knee Regional Grid, which Dr. Hoff-Sullivan utilized in her impairment evaluation, provides the diagnostic criteria for rating a knee impairment. The section on primary knee joint arthritis indicates that, for a class 3 impairment, there must be at least a one-millimeter cartilage interval with an impairment range of 26 to 34 percent.[21] The Board will remand the case to OWCP to obtain a supplementary report from its medical adviser. If necessary, OWCP should obtain the February 5, 2013 x-ray films for review. After this and such further development as deemed necessary, it shall issue an appropriate merit decision on the issue of appellant's left leg impairment.[22]

CONCLUSION

The Board finds this case is not in posture for decision regarding the degree of appellant's left lower extremity impairment.

[16] *Id*.

[17] *Supra* note 2.

[18] A copy of the February 5, 2013 x-ray report is not found in the record before the Board.

[19] The Board has held that a medical expert should only determine the medical question certified to him. Determination of the legal standards in regard to such medical questions is outside the scope of his expertise. *See Jeannine E. Swanson*, 45 ECAB 325 (1994).

[20] *Supra* note 14.

[21] *Supra* note 3 at 511.

[22] *See M.D.*, Docket No. 13-503 (issued September 19, 2013).

ORDER

IT IS HEREBY ORDERED THAT the September 24 and June 5, 2013 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: April 16, 2014
Washington, DC

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

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

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