United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 10-209**
	)	**Issued: August 18, 2010**
DEPARTMENT OF THE INTERIOR, ELKO BUREAU OF LAND MANAGEMENT, Elko, NV, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2009 appellant filed a timely appeal from an April 29, 2009 merit decision of the Office of Workers' Compensation Programs regarding his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant has more than three percent impairment of his right leg, for which he received a schedule award.

FACTUAL HISTORY

On May 6, 2005 appellant, then a 28-year-old supervisory range technician (wildland firefighter), injured his right knee while performing physical training exercises required for his job. The Office accepted the claim for aggravation of right knee osteochondritis dissecans and right chondromalacia, except patella, as being work related. On May 17, 2005 appellant

underwent right knee arthroscopy with abrasion chondroplasty of the medial femoral condyle. On June 9, 2005 he underwent right knee arthroscopy with osteochondral autograft transplant. The Office paid compensation for periods of wage loss. Appellant eventually returned to full-time light duty with restrictions. He was unable to return to firefighting duties due to knee pain and intermittent effusions with any aggressive physical activity, including running, hiking or walking downhill.

On October 1, 2007 appellant filed a Form CA-7 schedule award claim for his accepted right knee conditions[1].

On October 29, 2007 the Office referred appellant Dr. Michael E. Callahan, a Board-certified orthopedic surgeon, for an opinion on the extent of any permanent impairment. In a December 13, 2007 report, Dr. Callahan reviewed the history of appellant's injury statement of accepted facts and set forth findings on examination. The right knee demonstrated range of motion from -5 degrees to 135 degrees, without muscle weakness, atrophy or instability. X-rays showed four-millimeter joint clear space in the right knee medial compartment with very small areas in the subchondral area where the bone plugs were placed with early post-traumatic degenerative arthritis. Dr. Callahan opined that appellant reached maximum medical improvement on June 1, 2006, approximately one year following the osteochondral transplant procedure.

In a February 7, 2008 report, an Office medical adviser reviewed the medical evidence of record. He noted that Dr. Callahan provided findings on physical examination but did not provide an impairment rating. The Office medical adviser indicated that appellant had residual problems in his knee as a result of his osteochondritis dissecans which resulted from his work-related injury and necessitated treatment including two surgical procedures with an osteochondral autograft transplant, but advised the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) did not provide a specific impairment for that condition. He indicated in situations where impairment ratings are not provided, the A.M.A., *Guides* at section 1.5, page 11 suggest that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment or function in performing activities of daily living. The physician's judgment, based upon experience, training, skills, thoroughness in clinical evaluation and ability to apply the A.M.A., *Guides* criteria as intended, would enable an appropriate and reproducible assessment to be made of clinical impairment. The Office medical adviser opined, based on the above, that appellant would have approximately three percent impairment of his right leg as he had radiographic evidence of early degenerative joint disease with no joint space narrowing. He further opined that the date of maximum medical improvement was June 1, 2006, as recommended by Dr. Callahan.

[1] Appellant is treated by Dr. Steven F. Gunnell, an osteopath, for continued problems with his right knee. He received several corticosteroid anti-inflammatory injections in his right knee, the most recent on September 19, 2007.

By decision dated April 29, 2009, the Office granted appellant a schedule award for three percent permanent impairment of the right leg.[2] The award covered the period June 1 through July 31, 2006.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[3] and its implementing regulations[4] set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage of loss of use.[5] However, neither the Act nor the regulations specify the manner in which the percentage of impairment shall be determined. For consistent results and to ensure equal justice for all claimants, the Office adopted the A.M.A., *Guides* as a standard for determining the percentage of impairment and the Board has concurred in such adoption.[6]

It is the claimant's burden to establish that he or she sustained permanent impairment to a scheduled member or function as a result of an employment injury.[7] Office procedures provide that, to support a schedule award, the file must contain medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement) describes the impairment in sufficient detail to include, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation or other pertinent description of the impairment and the percentage of impairment should be computed in accordance with the fifth edition of the A.M.A., *Guides.* The procedures further provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment and the Office medical adviser should provide rationale for the percentage of impairment specified.[8]

ANALYSIS

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

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[2] The Office inadvertently stated that the award was to the right upper extremity impairment.

[3] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[4] 20 C.F.R. § 10.404.

[5] 5 U.S.C. § 8107(c)(19).

[6] *Supra* note 3.

[7] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Evaluation of Schedule Awards*, Chapter 2.808.6(d) (August 2002). *See Thomas J. Fragale*, 55 ECAB 619 (2004).

Appellant's treating physician, Dr. Gunnell did not provide an impairment rating. Dr. Callahan, the second opinion physician to whom appellant was referred for an impairment evaluation, did not provide an impairment rating. The Office granted appellant three percent permanent impairment of the right leg based on the rating by the Office medical adviser on February 7, 2008. In his report, the Office medical adviser reviewed Dr. Callahan's report and stated that the A.M.A., *Guides* did not provide for a specific impairment for appellant's condition. He opined that appellant had three percent permanent impairment of the right lower extremity under section 1.5 at page 11 of the A.M.A., *Guides*, which encourages a physician to use his clinical judgment in making an impairment rating. The section referenced by the Office medical adviser reads as follows:

> "The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation and ability to apply the [A.M.A.,] *Guides* criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment. Clinical judgment, combining both the 'art' and 'science' of medicine, constitutes the essence of medical practice."

In this case, the Office medical adviser did not conduct a clinical evaluation of appellant. He based his rating on a review of the medical evidence. Appellant's most recent physical examination was performed by Dr. Callahan, a second opinion physician, on December 13, 2007. Therefore, this general portion of the A.M.A., *Guides* does not support the Office medical adviser's determination as he did not examine appellant. The Office medical adviser did not cite any other specific sections of the A.M.A., *Guides* to support his impairment rating for appellant's right leg. The Office requested that Dr. Callahan examine appellant.[9] The Office medical adviser did not provide an impairment rating and the Office did not seek a supplemental report from Dr. Callahan to secure a probative opinion on the extent of appellant's permanent impairment.

Proceedings under the Act are not adversarial in nature. The Office shares in the responsibility to develop the evidence and has an obligation to see that justice is done. The Board has held that, once the Office undertakes development of the claim, it has the responsibility to do so in a proper manner.[10] The case will be remanded for the Office to further develop the medical evidence as to the nature and extent of permanent impairment based on appellant's accepted right knee condition. After such further development as deemed necessary, the Office should issue a decision regarding the extent of impairment to his right leg.

On appeal, appellant questioned how his impairment was determined. As noted, the Board finds that the Office must further develop the medical evidence regarding the extent of his permanent impairment. While appellant contends that his impairment evaluation should be based on an unsuccessful micro-fracture surgery, this is a medical question which must be based upon a physician's clinical evaluation.

[9] The record does not contain a copy of the referral letter to Dr. Callahan.

[10] *P.K.*, 60 ECAB ___ (Docket No. 08-2551, issued June 2, 2009).

CONCLUSION

The Board finds that the case is not in posture for decision on whether appellant has more than three percent permanent impairment of the right leg.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2009 decision of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for proceedings consistent with this decision of the Board.

Issued: August 18, 2010
Washington, DC

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

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

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