United States Department of Labor
Employees' Compensation Appeals Board

A.B., Appellant	)	
and	)	**Docket No. 11-72**
	)	**Issued: August 17, 2011**
U.S. POSTAL SERVICE, PARKGROVE STATION, Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 October 12, 2010 appellant filed a timely appeal of a September 17, 2010 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 is entitled to a schedule award for a right lower extremity impairment greater than the two percent previously awarded.

On appeal appellant's attorney asserts that the schedule award decision is contrary to fact and law.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 20, 2006 appellant, then a 55-year-old letter carrier, injured both knees when he tripped and fell off a porch while delivering mail. He stopped work that day. The claim was initially accepted for left knee sprain, and expanded to include complete tear of the anterior cruciate ligament (ACL) and flap tear of the meniscus of the right knee. Appellant was placed on the periodic compensation rolls, and on April 28, 2006 Dr. Kenneth R. Cervone, a Board-certified orthopedic surgeon, performed a right ACL reconstruction, lateral meniscectomy and chondroplasty of the medial femoral condyle. On November 10, 2006 Dr. Cervone performed a second medial meniscectomy and chondroplasty.

Appellant returned to modified duty for four hours daily on April 17, 2007 and continued in that position until October 27, 2007 when he was placed in a permanent rehabilitation position at the employing establishment's call center. On November 15, 2007 he filed a schedule award claim.

By decision dated January 10, 2008, OWCP found that appellant's actual earnings at the call center fairly and reasonably represented his wage-earning capacity with zero loss. In a February 11, 2008 report, Dr. Cervone advised that appellant had reached maximum medical improvement.

OWCP referred appellant to Dr. B.S. Bohra, an orthopedic surgeon, for a second opinion evaluation and impairment rating. In an April 8, 2008 report, Dr. Bohra reported the history of injury, provided physical examination and x-ray findings and diagnosed chondromalacia of the right knee with weakness of the quadriceps and hamstrings of the knee. He advised that appellant had not reached maximum medical improvement. In an April 17, 2008 report, Dr. Jeffrey F. Wirebaugh, an attending Board-certified family physician, described the employment injury and provided physical examination findings. He advised that in accordance with Table 17-33 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter A.M.A., *Guides*),[2] appellant had a 2 percent right lower extremity impairment for medial meniscectomy, a 7 percent impairment for mild cruciate ligament laxity, and a 7 percent impairment for mild medial collateral ligament (MCL) laxity, for a total 16 percent right lower extremity impairment. In a May 31, 2008 report, Dr. Bohra advised that, after review of additional information, appellant had a two percent right lower extremity impairment. In reports dated July 2 and 11, 2008, Dr. Anthony F. Skalak, an orthopedic surgeon and OWCP medical adviser, stated that he had reviewed the medical record and advised that clarification was needed regarding appellant's impairment rating. He recommended an impartial evaluation.

OWCP determined that a conflict in medical evidence had been created regarding whether maximum medical improvement had been reached and the percentage of permanent impairment and referred appellant to Dr. Zachary J. Endress, a Board-certified orthopedic surgeon, for an impartial evaluation. In a December 10, 2008 report, Dr. Endress noted the history of injury and his review of the medical record. He stated that on examination appellant's

[2] A.M.A., *Guides* (5th ed. 2001).

right knee was stable to both varus and valgus with full extension and flexion to about 130 degrees. There was no palpable effusion and mild thickening of the synovium in the suprapatellar pouch. Lachman's, anterior drawer and pivot rests were normal. Dr. Endress advised that, due to the history, persistent knee synovitis, and chondromalacia, appellant could not return to his previous employment as a letter carrier but could continue sedentary work. OWCP requested that Dr. Endress provide a date of maximum medical improvement and an impairment rating in accordance with the fifth edition of the A.M.A., *Guides*. In a January 21, 2009 report, Dr. Endress stated that appellant had reached maximum medical improvement but that he could not identify a date since he saw him on only one occasion. He advised that he did not find any laxity in the ACL or MCL but that appellant continued to have persistent synovitis of the knee. Dr. Endress further stated, "I am not familiar with the percent of impairment rating scale that you requested that I place him into." In a February 10, 2009 report, Dr. Skalak advised that maximum medical improvement was reached on May 10, 2007 and that, in accordance with Figure 17-33 of the fifth edition of the A.M.A., *Guides*, appellant had a two percent impairment due to partial medial meniscectomy.

On March 9, 2009 OWCP found the weight of the medical evidence rested with the opinion of Dr. Endress and granted appellant a schedule award for a two percent impairment of the right lower extremity, for a period of 5.76 weeks. It found the date of maximum medical improvement was December 10, 2008, the date of Dr. Endress' examination. On March 21, 2009 appellant, through his attorney, requested a hearing, that was held telephonically on June 8, 2009. Appellant testified that he was in constant pain and walked with a cane. His attorney argued that the opinion of Dr. Wirebaugh should be credited. By decision dated August 28, 2009, OWCP's hearing representative found the weight of the medical evidence rested with Dr. Endress' opinion and affirmed the March 9, 2009 decision.

Appellant retired on February 1, 2010. On April 13, 2010 he submitted an additional schedule award claim and an April 4, 2010 report in which Dr. William N. Grant, Board-certified in internal medicine, reported the history of injury and appellant's complaint of constant pain, stiffness and weakness of the right knee. Dr. Grant provided physical examination findings and diagnosed sprain of the right knee and leg, a tear of medial meniscus and an old disruption of the ACL. He provided an impairment worksheet and advised that in accordance with Table 16-23 of the sixth edition of the A.M.A., *Guides*,[3] appellant's flexion contracture of 15 degrees yielded a right lower extremity impairment of 20 percent, and flexion of 60 degrees yielded a 20 percent right lower extremity impairment, for a total combined impairment of 36 percent.

On August 11, 2010 Dr. Brian M. Tonne, an orthopedic surgeon and OWCP medical adviser, reviewed Dr. Grant's report and advised that his range of motion findings were inconsistent with the reports previously of record and did not provide a reasonable measure of impairment. He recommended that a new impartial evaluation be obtained regarding the degree of appellant's right lower extremity impairment. On August 23, 2010 OWCP provided Dr. Grant with reports from Dr. Cervone and Dr. Endress and asked that he explain the discrepancies in his range of motion findings.

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

By decision dated September 17, 2010, OWCP noted that Dr. Grant had not responded to the August 23, 2010 inquiry and denied appellant's claim for an additional schedule award.

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 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 Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[10] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[11] Under section 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 in cases involving a conflict in medical evidence, OWCP's medical adviser should not attempt to clarify or expand the opinion of the medical referee.[13] To properly resolve a medical conflict, it is the impartial medical specialist who should provide a reasoned opinion as to the extent of permanent impairment in accordance with the A.M.A., *Guides.* OWCP's medical adviser may review the opinion, but the resolution of the

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[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 3, 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] Federal (FECA) Procedure Manual, Chapter 3 -- Medical, *Medical Examinations*, Chapter 3.500.5c(1)(a) (March 1994).

conflict is the responsibility of the impartial medical specialist. Should the impartial specialist's opinion require clarification, OWCP should request a supplemental opinion consistent with Board precedent.[14] When the impartial medical specialist's statement of clarification or elaboration is not forthcoming, or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, OWCP must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[15] Unless this procedure is carried out by OWCP, the intent of section 8123(a) of FECA will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[16]

ANALYSIS

The Board finds that a conflict remains regarding the degree of impairment of appellant's right lower extremity. In its March 9, 2009 schedule award decision, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Endress, who provided an impartial evaluation for OWCP. OWCP granted appellant a schedule award for a two percent impairment of the right lower extremity. Appellant thereafter requested an additional schedule award and submitted an April 10, 2010 report from Dr. Grant who advised that, in accordance with the sixth edition of the A.M.A., *Guides*, appellant had a 36 percent right lower extremity impairment.

The Board finds that OWCP improperly relied on Dr. Endress' opinion because he did not provide an impairment rating. Dr. Endress clearly stated that he was not familiar with the impairment rating scale. His opinion was therefore insufficient to resolve the medical conflict regarding the percentage of impairment of appellant's right lower extremity. Nonetheless, it was also improper for OWCP to rely on Dr. Skalak's February 10, 2009 report, as OWCP's medical adviser is not to attempt clarification or expansion of an impartial specialist's opinion.[17] As noted above, to properly resolve a medical conflict, the impartial specialist should provide the opinion regarding the degree of impairment and not OWCP's medical adviser.

OWCP referred Dr. Grant's report to Dr. Tonne, OWCP's medical adviser, who advised that the physician's range of motion findings were inconsistent with the reports previously of record and did not provide a reasonable measure of impairment. Dr. Tonne recommended that a new impartial evaluation be obtained regarding the degree of appellant's right lower extremity impairment. Instead of following this recommendation, OWCP asked that Dr. Grant provide a supplemental report, and when he did not respond, issued a decision finding that appellant was not entitled to an increased schedule award.

[14] *Richard R. LeMay*, 56 ECAB 341 (2005).

[15] *W.D.*, Docket No. 09-199 (issued August 21, 2009).

[16] *I.H.*, Docket No. 08-1352 (issued December 24, 2008); *Harold Travis*, 30 ECAB 1071 (1979).

[17] *Richard R. LeMay*, *supra* note 14.

A claimant may seek an increased schedule award if the evidence establishes that he or she sustained an increased impairment at a later date based on new exposure or medical evidence showing progression of an employment-related condition resulting in an increased impairment.[18]

As appellant submitted a new medical report advising that appellant's condition has worsened and that he has increased impairment, the Board finds that a conflict in medical opinion remains. The Board will set aside OWCP's September 17, 2010 decision and remand the case to OWCP to refer appellant, along with a statement of accepted facts and the case record, to a second impartial specialist to determine the extent and degree of any employment-related impairment of the right lower extremity. After such further development as OWCP deems necessary, it shall issue an appropriate decision.

CONCLUSION

The Board finds that the case is not in posture for decision due to an unresolved conflict in medical opinion as to the extent of permanent impairment to appellant's right lower extremity.

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this opinion of the Board.

Issued: August 17, 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

[18] *See A.A.*, 59 ECAB 726 (2008).