United States Department of Labor
Employees' Compensation Appeals Board

A.L., Appellant	)	
and	)	**Docket No. 11-525**
	)	**Issued: November 15, 2011**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT AGENCY, FOOD SERVICE BRANCH, Wiesbaden, AE, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2010 appellant filed a timely appeal from a November 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this schedule award case.

ISSUE

The issue is whether appellant has greater than a 31 percent impairment to his lower right extremity, for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 10, 2007 appellant, then a 36-year-old food service worker, filed a traumatic injury claim alleging that, on April 9, 2007, while returning from taking out the trash, he slipped on a wet floor and twisted his right knee, thereby aggravating a preexisting injury. On October 24, 2008 OWCP accepted his claim for tear of the medial meniscus of the knee, current, right. It paid appropriate compensation and medical benefits.

In July 31, 2008 report, Dr. Med J. Pfeil, a German physician, indicated that from May 3 to 7, 2007 appellant underwent a surgical procedure where he had an arthroscopic meniscus repair and a grafting of the anterior cruciate ligament (ACL). He stated that appellant now reports that his feeling of instability have gone and that he has only some problems after hard work in the area of the anterior tibia of the right leg.

In a September 29, 2010 report, Dr. William F. Clayton, an orthopedist, noted that appellant fell on April 9, 2007 which led to surgery after a magnetic resonance imaging (MRI) scan showed an old ACL tear and bucket handle tear of the medial meniscus. He noted that appellant stated that this surgery did not help his knee pain and actually made it worse. Dr. Clayton stated that on September 24, 2009 appellant slipped at work and that this aggravated his right knee pain. He noted that appellant became more sensitive to cold and could not work in refrigerated areas any more. Dr. Clayton reviewed appellant's current symptoms. He stated that appellant reached maximum medical improvement for the first injury on November 3, 2007. Dr. Clayton stated that it was debatable whether the MRI scan findings of diffuse meniscal damage would be benefited by an arthroscopic debridement of the knee, but that this would probably be more related to the 2009 injury. He noted that the April 9, 2007 work injury aggravated appellant's preexisting ACL insufficient knee and probably caused the medial menisus tear. Dr. Clayton noted that this was appropriately treated with meniscal debridement and ACL reconstruction, but that clinically he has a poor result from the surgery with the findings today of postoperative fat pad syndrome, generalized degenerative joint disease of the knee from the 1998, 2007 and 2009 injuries, two centimeter right thigh atrophy and incisional neuroma and postoperative sensory deficit upper anterior tibial area. He stated that using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) pursuant to Table 13-12 on page 336 with regard to gait disorders, appellant would have a 10 percent lower extremity impairment for a more severe class 1 impairment. Dr. Clayton then used Table 16-3 on page 511 for moderate knee arthritis (combining with his MRI scan findings of meniscal damage) and determined there would be a 20 percent lower extremity impairment. He then used Table 13-17 page 339 for dysesthetic pain (incisional neuroma) and determined that it will be a class 1 or a three percent lower extremity impairment. Dr. Clayton then used Table 16-3, page 509 for partial medial meniscecomy and determined that would amount to a two percent impairment of the lower extremity. Combining these percentages (10, 20, 3 and 2) using the Combined Values Chart, he determined that appellant had an impairment to his right lower extremity of 31 percent.

An OWCP medical adviser reviewed the report of Dr. Clayton and agreed that appellant had a 31 percent impairment of the right lower extremity. The medical adviser used calculations identical to those of Dr. Clayton in reaching his conclusion.

By decision dated November 9, 2010, OWCP issued a schedule award for a 31 percent impairment of the right lower extremity. It listed the date of maximum medical improvement as September 29, 2010. The award was based on a weekly compensation of $432.25. In order to not delay appellant's award, OWCP found that a determination would be made later with regard to a clarification on appellant's entitlement to Sunday premium pay. It excluded, pursuant to 5 U.S.C. § 8114(e), from appellant's pay rate all additional pay or allowance, including postallowance pay, authorized outside the United States because of a differential in cost of living and other special circumstances. A separate maintenance allowance authorized under 5 U.S.C. § 5924(3) was also excluded as it is a cost-of-living allowance paid to an employee in a foreign area.

LEGAL PRECEDENT

The schedule award provision of FECA[2] and its implementing regulations[3] 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 result 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.[4] For decisions issued on or after May 1, 2009, the sixth edition of the A.M.A., *Guides* is used for evaluating permanent impairment.[5]

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 limb 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. The associated class is determined from the knee regional grid and the adjustment guide and grade modifiers (including functional history, physical examination and clinical studies) are used to determine what grade of associated impairment should be chosen within the class defined by the regional grid. The evaluator then uses the regional grid to identify the appropriate impairment rating value for the impairment class, modified by the adjustments as calculated.[6] Under Chapter 2.3, evaluators are directed to provide reasons for their impairing rating choices, including choices of diagnoses from the regional grids and calculations of the modifier scores.[7]

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404.

[4] *Id.*

[5] *See* FECA Bulletin No. 09-93 (issued March 15, 2009). For OWCP decisions issued before March 1, 2009, the fifth edition of the A.M.A., *Guides* (5th ed. 2001) is used.

[6] *See* A.M.A., *Guides* (6th ed. 2009) 499-500.

[7] *Id.* at 23-24.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[8] Accordingly, once OWCP undertakes to develop the medical evidence, further, it has the responsibility to do so in the proper manner.[9]

ANALYSIS

Both Dr. Clayton and OWCP's medical adviser agreed that, pursuant to the sixth edition of the A.M.A., *Guides*, appellant had a 31 percent impairment of his right lower extremity. However, neither physician appropriately applied the A.M.A., *Guides*. OWCP accepted appellant's claim for a tear of the medial meniscus of the knee. The appropriate chapter of the A.M.A., *Guides* to utilize when addressing the knee is Chapter 16. Certain calculations made by Dr. Clayton and OWCP's medical adviser were made utilizing Chapter 13 of the A.M.A., *Guides*. However, Chapter 13 of the A.M.A., *Guides* provides criteria for evaluating permanent impairments due to documented dysfunction of the central and peripheral nervous system.[10] The record does not indicate that appellant had such an injury. Accordingly, evaluating appellant's impairment utilizing Chapter 13 of the A.M.A., *Guides* was not appropriate. Both physicians found that appellant was entitled to 10 percent lower extremity impairment based on Table 13-12 for an antalgic gait. Table 13-12 addresses problems maintaining balance and a stable gait from a central nervous or peripheral neurologic impairment.[11] Furthermore, Table 13-12 addresses impairment with regard to impairment to the whole person. Dr. Clayton and OWCP's medical adviser determined that appellant had a 10 percent impairment to the lower extremity pursuant to this chart but neither converted this whole person impairment rating to an impairment rating for the lower extremity. FECA does not authorize a schedule award for whole person impairment.[12] Furthermore, both physicians found that appellant had a three percent impairment pursuant to Table 13-17 of the A.M.A., *Guides*. However Table 13-17 clearly states that, in order for this table to apply, one must first document that the individual has a peripheral neuropathy or spinal cord injury consistent with dysesthetic pain.[13] The Board further notes that, as with Table 13-12, Table 13-17 lists impairment ratings to the whole person, not to the lower extremity. The Board further finds that Dr. Clayton and OWCP's medical adviser did not appropriately make findings using Chapter 16. Although Chapter 16 of the A.M.A., *Guides* is the appropriate chapter to utilize in evaluating impairment of the lower extremity, neither physician properly applied this chapter. These physicians found that appellant had a 20 percent impairment to the lower extremity based on Table 16-3, page 511 due to moderate knee arthritis and a two percent impairment based on Table 16-3, page 509 for partial medial meniscectomy. Under the sixth

[8] *Russell F. Polhemus*, 32 ECAB 1066 (1981).

[9] *See Robert Hart*, 36 ECAB 186 (1984).

[10] A.M.A., *Guides* 322.

[11] *Id.* at 336.

[12] *L.C.*, Docket No. 10-2092 (issued July 5, 2011).

[13] A.M.A., *Guides* 339, Table 13-17.

edition of the A.M.A., *Guides*, impairment value is determined by the diagnosis and specific criteria, considered the key factor, and then adjusted by grade modifiers or nonkey factors.[14] However, neither physician discussed the grade modifiers as required by the sixth edition of the A.M.A., *Guides.*

There is also some confusion in the record as to the date of appellant's maximum medical improvement. Dr. Clayton found that the date of maximum medical improvement for the current injury is November 3, 2007. OWCP's medical adviser found that the date of maximum medical improvement was the date of Dr. Clayton's report, September 29, 2010. Neither physician adequately explains the choice of date for maximum medical improvement.

On appeal, appellant contends that his rate of pay should have included the postdifferential for overseas employees. The Board finds that OWCP properly excluded this pay from its calculations. Pursuant to 5 U.S.C. § 8114(e), account is not made in determining appellant's rate of pay of overtime pay, additional pay or allowance authorized outside the United States because of differential in cost of living or other special circumstances such as bonus or premium pay or pay for hazardous service in time of war.[15]

The Board will remand this case, however, for OWCP to refer appellant for an evaluation and to recalculate appellant's impairment rating. After such further development of the case record as OWCP deems necessary, a *de novo* decision shall be issued regarding appellant's claim for a schedule award.

CONCLUSION

The Board finds that the case is not in posture for decision regarding the percentage of impairment to appellant's lower right extremity. The case is remanded for further necessary development.

[14] *Id.* at 495.

[15] 5 U.S.C. § 8114(e).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 9, 2010 is set aside and the case remanded for further action consistent with this decision.

Issued: November 15, 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