

**United States Department of Labor
Employees' Compensation Appeals Board**

J.F., Appellant)	
)	
and)	Docket No. 11-314
)	Issued: September 22, 2011
DEPARTMENT OF ENERGY,)	
GERMANTOWN OFFICE FACILITY,)	
Germantown, MD, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Jeffrey P. Zeelander, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 22, 2010 appellant, through his representative, filed a timely appeal from a November 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) granting a schedule award. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the schedule award determination.

ISSUE

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

FACTUAL HISTORY

On December 22, 2003 appellant, then a 51-year-old pipe fitter, filed a traumatic injury claim alleging that on December 20, 2003 he twisted his left leg and experienced pain and

¹ 5 U.S.C. § 8101 *et seq.*

swelling in his knee when the ladder he was using was kicked out from underneath him. OWCP accepted his claim for medial meniscus tear of his left knee. On April 2, 2004 appellant underwent an arthroscopy and debridement of the medial meniscus of his left knee.

On September 7, 2010 appellant filed a claim for a schedule award. In a July 16, 2010 report, Dr. Donald Saltzman, a Board-certified orthopedic surgeon, provided a history of injury and utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) (hereinafter A.M.A., *Guides*). An examination of appellant's right knee revealed full range of motion without pain, tenderness and effusion. The Lachman, McMurray and drawer signs were negative. An examination of appellant's left knee revealed healed arthroscopic portals and full flexion and extension with no instability to medial and lateral test. His Lachman, McMurray and drawer signs were negative. Measurements for atrophy revealed that both thighs and calves were equal in circumference with no measurable atrophy. Appellant complained of some discomfort over the medial aspect of the knee near the femoral condyles and the medial joint.

Dr. Saltzman reviewed appellant's medical records and noted that June 2010 x-rays of appellant's left knee revealed arthritic changes with some spurring and mild medial space narrowing, compared to the lateral side. The spurs were off the medial most part of the joint and the retropatellar area appeared normal. Dr. Saltzman observed that a 2004 magnetic resonance imaging (MRI) scan report revealed multi-compartment arthritic changes present in association with a bucket tear and generalized meniscal degeneration.²

Dr. Saltzman opined that appellant was postpartial left medial meniscectomy and had reached maximum medical improvement. According to an MRI scan taken at the time of the injury, appellant had preexisting arthritic changes within the knee joint. Dr. Saltzman referred to Table 16-3, page 509 and placed appellant in class 1 because he underwent a partial medial meniscectomy. He explained that appellant had a grade 1 modifier for physical and clinical studies, functional history assessment, and physical examination and a grade 2 modifier for clinical studies. This placed appellant in a class C grade that resulted in two percent impairment of the lower extremity. Based on the regional grid, he also placed appellant in class 1 for primary knee arthritis according to Table 16-3, page 511 and opined that he had an additional six percent impairment of the lower extremity. Dr. Saltzman explained, however, that the degenerative arthritis in the knee was unrelated to the work injury because it was already present at the time of the injury. He recommended that appellant's impairment rating include the two percent impairment of the knee for the meniscectomy and the six percent impairment for the arthritis, which totaled eight percent impairment of the left lower extremity.

In an October 28, 2010 report, OWCP's medical adviser reviewed Dr. Saltzman's report and concurred that appellant had reached maximum medical improvement. He provided an accurate history of injury and noted a diagnosis of left meniscus tear with surgical intervention. OWCP's medical adviser, however, found that appellant was only entitled to a two percent

² In a February 6, 2004 MRI scan report, Dr. Elan Halperin, a Board-certified diagnostic radiologist, observed that appellant's marrow signal was preserved with the exception of the lateral tibial plateau degenerative changes just posterolateral of the lateral tibial spine. He also noted a femoral condylar cartilage defect over its convexity, an anterior cruciate ligament cyst with an intact ligament, a diffusely abnormal medial meniscus with a free edge bucket-handle type tear posterior horn and multi-compartmental osteoarthritic changes.

impairment rating for the lower extremity resulting from the left knee meniscectomy. He explained that the additional six percent impairment for the arthritis should not be considered because the left knee arthritis preexisted the work injury and Dr. Saltzman had incorrectly added the additional diagnosis. OWCP's medical adviser also opined that the evidence did not document a diagnosis of primary knee arthritis of three millimeter (mm) cartilage interval or full thickness defect.

In a decision dated November 17, 2010, OWCP granted appellant a schedule award for a two percent impairment of the left lower extremity for the period of 5.76 weeks from August 16 to September 25, 2010.

LEGAL PRECEDENT

The schedule award provision of FECA, and its implementing federal regulations³ 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.⁴ For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁵ For decisions after May 1, 2009, the sixth edition will be used.⁶

The Board has held that, in determining entitlement to a schedule award, preexisting impairments to the scheduled member are to be included.⁷ OWCP procedures state that any previous impairment to the member under consideration is included in calculating the percentage of loss, except when the prior impairment is due to a previous work-related injury, in which the percentage already paid is subtracted from the total percentage of impairment.⁸

Before the A.M.A., *Guides* can be utilized, a description of appellant's impairment must be obtained from his physician. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment.⁹

It is well established that proceedings under FECA are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, OWCP shares

³ 20 C.F.R. § 10.404.

⁴ *Id.* at § 10.404(a).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (January 2010).

⁶ FECA Bulletin No. 09-03 (issued March 15, 2009).

⁷ *Michael C. Milner*, 53 ECAB 446, 450 (2002); *Raymond E. Gwynn*, 35 ECAB 247 (1983).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards & Permanent Disability Claims*, Chapter 2.808.7(2) (January 2010).

⁹ *See Peter C. Belkind*, 56 ECAB 580 (2005).

responsibility in the development of the evidence.¹⁰ It has an obligation to see that justice is done.¹¹ Once OWCP undertakes the development of the record, it has the responsibility to do so in a proper manner.¹²

ANALYSIS

OWCP accepted appellant's claim for medial meniscus tear of his left knee. By decision dated November 17, 2010, it granted him a schedule award for a two percent impairment of the left lower extremity. The Board finds that this case is not in posture for decision.

In a July 16, 2010 report, Dr. Saltzman provided an accurate history of injury and conducted an examination. He noted that appellant's left knee revealed healed arthroscopic portals and full flexion and extension with no instability to medial and lateral tests. Based on Table 16-3 of the sixth edition of the A.M.A., *Guides*, Dr. Saltzman opined that appellant had a two percent impairment of his lower extremity due to the partial medial meniscectomy. He also observed that a 2004 MRI scan and June 2010 x-ray showed multi-compartment arthritic changes in appellant's left knee and opined that he had an additional six percent impairment for preexisting arthritis, which resulted in a total of eight percent impairment of his lower left extremity. The June 2010 x-ray report which Dr. Saltzman utilized to rate appellant's arthritis of the left knee is not of record.

OWCP's medical adviser reviewed Dr. Saltzman's report and disagreed with his determination. He found that appellant had a two percent impairment of his left lower extremity for his partial medial meniscectomy. OWCP's medical adviser opined that appellant was not entitled to an additional award based upon the arthritis findings because appellant's arthritis was not work related and the evidence did not document that appellant had three mm arthritis in his left knee. OWCP found that the weight of the medical evidence rested with OWCP's medical adviser.

The Board finds that the case is not in posture for decision. As previously noted, preexisting impairments to the member under consideration are included in calculating the percentage of loss for a schedule award.¹³ Thus, the fact that the arthritis preexisted the employment injury does not preclude an additional award. Pursuant to Table 16-3 of the A.M.A., *Guides*,¹⁴ if arthritis is the primary diagnosis, with three mm cartilage interval or less, the left knee impairment can be rated as a minimum impairment of five percent of the lower

¹⁰ *Donald R. Gervasi*, 57 ECAB 281, 286 (2005); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

¹¹ *John J. Carlone*, 41 ECAB 354 (1989).

¹² *See Henry G. Flores, Jr.*, 43 ECAB 901 (1992).

¹³ *Supra* note 8.

¹⁴ Knee Regional Grid page 509.

extremity. If, however, the primary diagnosis is the left knee menisectomy, pursuant to Table 16-3¹⁵ and Table 16-8,¹⁶ a clinical studies adjustment can be made on the basis of the arthritis.

On remand OWCP should obtain supplemental opinion from Dr. Saltzman regarding impairment due to appellant's left knee arthritis.¹⁷ Dr. Saltzman should be authorized to obtain an x-ray. After such development as it deems necessary, OWCP shall issue an appropriate merit decision regarding appellant's entitlement to schedule award compensation. The case is remanded for further development.

CONCLUSION

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

ORDER

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

Issued: September 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Id.*

¹⁶ *Id.* at 519.

¹⁷ See *Nathan L. Harrell*, 41 ECAB 402 (1990); *D.H.*, Docket No. 10-2013 (issued July 11, 2011).