United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 11-546**
	)	**Issued: September 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 3, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) schedule award decision dated November 29, 2010. 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 decision.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained more than an eight percent permanent impairment to his left leg, for which he received a schedule award.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.[2] In a January 28, 2010 OWCP decision, the Board set aside an October 22, 2008 OWCP schedule award decision.[3] The Board found that the case was not in posture for decision as the report of the second opinion physician, Dr. Steven Valentino, a Board-certified orthopedic surgeon, was insufficiently rationalized. The Board found that he failed to take into account appellant's preexisting arthritis as he erroneously apportioned between impairment caused by his work injury and any preexisting impairment.[4] The Board remanded the case for further action in conformance with its decision. The facts and history contained in the prior appeal are incorporated by reference.

In a letter dated February 2, 2010, counsel requested that OWCP comply with the Board's decision and provide an updated schedule award. He noted that Dr. Valentino's report should not be relied upon as it was "untrustworthy."

By letter dated June 14, 2010, OWCP referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon.

In a July 22, 2010 report,[5] Dr. Smith noted appellant's history of injury and treatment and set forth findings on examination. He found that appellant walked with a limp on the right side. Regarding the left knee, Dr. Smith found a mild varus deformity, no instability in any of the ligaments of the knee and no effusion. Appellant had active range of motion with full extension to 0 degrees and flexion to 90 degrees. Dr. Smith advised that, during motion, the knee demonstrated rather significant crepitation that was consistent with arthritis. He also indicated that the McMurray's test maneuver was equivocal. Dr. Smith reviewed diagnostic studies of the knee which revealed significant degenerative disease with tearing of both the remnants of the medial and lateral menisci along with evidence of tendinopathy of the patellar tendon. He opined that there was a substantial permanent aggravation of appellant's preexisting left knee arthritis and noted that 75 percent was due to the preexisting condition. Dr. Smith explained that appellant was not at maximum medical improvement although he had reached maximum benefit from conservative treatment. He explained that appellant was a candidate for a left total knee replacement, the definitive treatment for the accepted condition of aggravation of the preexisting arthritis of the left knee. Dr. Smith noted that once appellant had an arthroplasty procedure, appropriately rehabilitated and brought to maximum medical improvement, he could have his knee rated at that time relative to the April 17, 2006 work injury. He indicated that the normal time period, for maximum medical improvement for a total knee replacement was one year. Dr. Smith indicated that appellant was fit for sedentary work and provided restrictions.

[2] Docket No. 09-290 (issued January 28, 2010).

[3] In a January 28, 2010 decision, the Board also reversed the October 22, 2008 decision that terminated appellant's compensation benefits.

[4] *See Juanita L. Spencer*, 56 ECAB 611 (2005); *Dale B. Larson*, 42 ECAB 481 (1990).

[5] The report indicates 2008; however, this is a typographical error.

On July 28, 2010 OWCP expanded the claim to include permanent aggravation of preexisting arthritis of the left knee.

In a report dated August 21, 2010, OWCP's medical adviser reviewed appellant's history of injury, treatment and the medical evidence. He utilized the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* hereinafter (A.M.A., *Guides*) (6th ed. 2008) to Dr. Smith's findings. The x-rays of the left knee from November 26, 2002 revealed significant osteoarthritis of the medial and lateral compartments. OWCP's medical adviser noted that there were no specific measurements of the thickness of the hyaline cartilage on any of the clinical examinations. He found that there were degenerative tears of both the medial and lateral menisci with mild osteoarthritis of the patellofemoral joint as revealed in the May 16, 2006 magnetic resonance imaging (MRI) scan of the left knee. Appellant underwent prior arthroscopic surgery in 1999. OWCP's medical adviser referred to Table 16-3: Knee Regional Grid, Lower Extremities Impairments, primary knee arthritis and advised that appellant would fall into a class 1 for a three millimeter full thickness cartilage defect and noted that grade C, the default value, provided for seven percent impairment.[6] He applied the adjustment grid and grade modifiers in Table 16-6: Functional History Adjustment, Lower Extremity Impairments with a grade modifier 2, for a moderate problem.[7] OWCP's medical adviser also referred to Table 16-7: Physical Examination Adjustment Lower Extremities[8] and applied a Grade 1 modifier.[9] He referred to Table 16-8: Clinical Studies Adjustment Lower Extremities.[10] OWCP's medical adviser explained that 10 to 20 percent angulation versus 10 percent angulation was considered, and no percentage was given but that the general descriptions would most closely resemble Grade 1. He utilized the net adjustment formula, mathematical explanation, to determine the net adjustment was plus one. OWCP's medical adviser applied the net adjustment result according to appellant's diagnosis on page 511 and to move the default grade C rating to a grade D rating with allowed eight percent impairment. He determined that appellant had a total impairment of the left lower extremity of eight percent, which represented a one percent increase over the previously awarded seven percent impairment. OWCP's medical adviser determined that appellant reached maximum medical improvement on Dr. Smith's examination date of July 22, 2008.

By decision dated November 29, 2010, OWCP granted appellant a schedule award for an additional one percent permanent impairment of the left lower extremity.[11]

[6] A.M.A., *Guides* 511.

[7] *Id.* at 516.

[8] *Id*. at 517.

[9] He noted Grade D; however it appears to be a grade modifier 1.

[10] A.M.A., *Guides* 519.

[11] It noted that appellant had previously received a schedule award for seven percent of the left lower extremity for a meniscal tear on November 28, 2001 under File No. xxxxxx967.

LEGAL PRECEDENT

The schedule award provision of FECA[12] and its implementing regulations[13] sets 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 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. For decisions issued after May 1, 2009, the A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[14]

In addressing lower extremity impairments, the sixth edition requires identifying 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).[15] The net adjustment formula is GMFH-CDX + GMPE-CDX + GMCS-CDX.[16]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with its medical adviser providing rationale for the percentage of impairment specified.[17]

ANALYSIS

The Board finds that this case is not in posture for decision. Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.[18]

On remand, OWCP referred appellant for a second opinion examination and evaluation of appellant to include his preexisting conditions with Dr. Smith. On July 22, 2010 Dr. Smith examined appellant and provided findings; however, he did not provide an impairment rating. OWCP properly had its medical adviser review the matter.[19]

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[12] 5 U.S.C. § 8107.

[13] 20 C.F.R. § 10.404.

[14] FECA Bulletin No. 09-03 (issued March 15, 2009). A.M.A., *Guides* (6th ed. 2008).

[15] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[16] *Id.* at 521.

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[18] *Horace L. Fuller*, 53 ECAB 775, 777 (2002).

[19] *See supra* note 17.

OWCP's medical adviser utilized the findings provided by Dr. Smith. He noted that x-rays of the left knee from November 26, 2002 revealed significant osteoarthritis of the medial and lateral compartments but that there were no specific measurements of the thickness of the hyaline cartilage on any of the clinical examinations. OWCP's medical adviser then referred to Table 16-3: Knee Regional Grid, Lower Extremities Impairments for appellant's primary knee arthritis and advised that appellant would fall into a class 1 for a three millimeter full thickness cartilage defect, and applied a grade C, the default value for seven percent impairment.[20] He proceeded to evaluate appellant and provided an impairment rating of eight percent. However, the Board finds that it is unclear where the measurement for the three millimeter full thickness cartilage defect came from. The Board notes that Table 16-3, page 511 of the A.M.A., *Guides* provides that patellofemoral arthritis with a full-thickness articular cartilage defect is a class 1 and that the more severe diagnostic classes for patellofemoral arthritis for class 2 require joint space narrowing of one millimeter interval or no cartilage interval pursuant to radiographs. OWCP's medical adviser noted that there were no specific measurements of the thickness of the hyaline cartilage on any of the clinical examinations, but he provided an impairment rating based on a three millimeter thickness of the hyaline cartilage with no x-ray findings to support this selection. His report is therefore of limited probative value. For this reason, the case will be remanded to OWCP.

On remand OWCP should further develop the medical evidence of record and obtain an opinion as to whether appellant sustained more than an eight percent permanent impairment to his left lower extremity, for which he received a schedule award. It should request the examining physician to conduct appropriate examination of the extremities, including obtaining an appropriate x-ray examination or other testing needed to document the impairment rating. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

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

[20] A.M.A., *Guides* 511.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2010 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: September 26, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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